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No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

COUNTY SANITATION DISTRICT NO. 2 OF LOS ANGELES COUNTY, A PUBLIC AGENCY,

Petitioner,

vs.

LOS ANGELES COUNTY EMPLOYEES ASSOCIATION, LOCAL 660, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO, ET AL.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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QUESTION PRESENTED

Whether the California Supreme Court's decision in *County Sanitation District No. 2 of Los Angeles County v. Los Angeles County Employees' Association, Local 660*, granting Sanitation District workers the right to strike is repugnant and in conflict with the Federal Water Pollution Control Act[1] and the Federal Resource Conservation and Recovery Act of 1976[2].

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[1] 33 U.S.C. §§ 1251-1376 (West Supp. 1977).

[2] 42 U.S.C. §§ 6901-6987 (West Supp. 1977).

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No.

IN THE SUPREME COURT OF THE UNITED STATES

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COUNTY SANITATION DISTRICT NO. 2 OF LOS ANGELES COUNTY, A PUBLIC AGENCY,

Petitioner,

vs.

LOS ANGELES COUNTY EMPLOYEES ASSOCIATION, LOCAL 660, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO, ET AL.,**

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

The Petitioner, County Sanitation District No. 2 of Los Angeles County, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of California entered in this proceeding

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** The other Respondents are Victor N. Hochee, Harry Gluck, and Jack Roberts.

on May 13, 1985. On June 27, 1985, the Supreme Court of the State of California denied the timely Petition For Rehearing filed by the Petitioner in this case.

OPINION AND JUDGMENT BELOW

The opinion of the California Supreme Court (which includes the judgment sought to be reviewed by this Petition), together with the concurring and dissenting opinions, are reprinted as Appendix A. That decision is reported as *County Sanitation District No. 2 of Los Angeles County v. Los Angeles County Employees' Association, Local 660*, 38 Cal.3d 564, 214 Cal.Rptr. 424, 699 P.2d 835 (1985). The California Court of Appeal decision is reprinted as Appendix B. That decision is reported as *County Sanitation District No. 2 of Los Angeles County v. Los Angeles County Employees' Association, Local 660*, 147 Cal.App.3d 990, 195 Cal.Rptr 567 (1983) (withdrawn from publication). The California Court of Appeal's decision affirmed the trial court's finding as to liability and modified the damage award. The unreported judgment and findings of fact and conclusions of law of the trial court after trial are reprinted as Appendix C.

JURISDICTION

The opinion of the California Supreme Court in *Sanitation District* was filed on May 13, 1985. A timely Petition for Rehearing was denied on June 27, 1985. This Court's jurisdiction is properly invoked under 28 U.S.C. § 1257(3).

STATUTORY PROVISIONS INVOLVED

The Federal Water Pollution Control Act, as amended, and the Federal Resource Conservation and Recovery Act, as amended, are reprinted in pertinent part as Appendices D and E.

STATEMENT OF THE CASE

Petitioner is one of twenty-seven sanitation districts within Los Angeles County. Each such district is a separate and autonomous political subdivision of the State of California, authorized by the California Health and Safety Code. *Cal. Health and Safety Code* §§ 4700 *et seq.* (West 1970 and Supp. 1983). County Sanitation District No. 2 of Los Angeles County is authorized by a joint powers agreement to act on behalf of itself and the twenty-six other districts in numerous matters, including personnel and labor relations. (These twenty-seven sanitation districts are hereinafter jointly referred to as "the District").

The District operates sewage treatment plants and approximately eleven thousand miles of sewer trunk lines. In 1976, the eleven sewage treatment plants processed approximately four hundred fifty million gallons of raw sewage each day. Most of these plants are upstream "feeders" to the Joint Water Pollution Control Plant located in Carson, California (hereinafter referred to as "JWPCP"). The District also operates sanitary landfills for the disposal of rubbish which in 1976 received approximately fifteen thousand tons of refuse each day. In maintaining these operations, the District served approximately four million County residents.

The District's labor relations are governed by the Meyers-Milias-Brown Act,[3] and its employee relations resolution, as authorized under the Act. Respondent Local 660 is a labor organization affiliated with the Service Employees International Union, AFL-CIO, which has represented the District's blue collar employees since 1973.

The District and Local 660 have bargained concerning the wages, hours and working conditions of the District's blue collar employees, under the Meyers-Milias-Brown Act, since 1973. Each year these negotiations resulted in a binding labor contract or Memorandum of Understanding ("MOU").[4] *See Glendale City Employees Ass'n v. City of Glendale*, 15 Cal.3d 328, 124 Cal.Rptr. 513, 540 P.2d 609 (1975), *cert. denied*, 424 U.S. 943 (1976).

Local 660 has struck in support of its collective bargaining demands on two occasions. In June 1974, Local 660 engaged in a five-day strike supported by virtually all of the District's blue collar employees. Local 660's second strike, the subject of this case, lasted from July 5 through July 16, 1976.

The primary objective of both strikes was to shut down the District's facilities and to force the District to pump raw sewage into waterways and the Pacific Ocean. The purpose of this action was to place economic and political pressure on the District to settle the strikes and to accede to the Union's demands. The Union attempted to accomplish this purpose by withholding the services of its members. There was also a concerted and sophisticated attempt to sabotage critical equipment at the District's facilities, including vital

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[3] *Cal. Gov't Code* §§ 3500-3511 (West 1980 and Supp. 1983).

[4] Prior to 1977, the MOUs were one year in duration.

equipment at the JWPCP.[5] As explained below, the consequences of these actions, if successful, would have been the discharge of raw sewage into waterways and the ocean in direct violation of federal law.

On July 6, 1976, the District filed a complaint for injunctive relief and damages based upon the involvement of Local 660 and the other Respondents in the strike against the District. On the same date the complaint was filed, the District sought and obtained a temporary restraining order prohibiting the strike. However, Local 660 ignored the order. As a result of this failure to obey the order, Local 660 was adjudged guilty of contempt in October 1976, and fined $1,500.

Thereafter, the District proceeded with the prosecution of this action. On August 13, 1981, following a twelve-day bench trial before the Honorable Charles H. Older, judgment was entered in favor of the District in the amount of $246,904, with interest thereon from July 18, 1976, and costs in the amount of $874.65.

The Respondents appealed from this judgment. The Court of Appeal, Second Appellate District[6] affirmed the trial court's finding of liability, declaring itself "bound by the presently well-settled rules that deny public employees the right to strike and which subject those who do engage in

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[5] The acts of sabotage discovered during the strike included: (1) the bacteria in sewage digestion tanks that are used to produce methane gas, the primary source of power for the JWPCP's effluent pumps, were overfed to cause a decrease in methane gas production, (2) a sewage discharge line was blocked with a plywood disc, (3) the battery cables to generators had been cut, and (4) debris was thrown into the sewage system in an attempt to damage the mechanical rakes and screens which prevent flotsam from entering the JWPCP.

[6] The Court of Appeal's decision is reprinted as Appendix B.

such unlawful labor practices to tort actions for damages." *County Sanitation District No. 2 of Los Angeles County v. Los Angeles County Employees Ass'n Local 660*, 147 Cal.App.3d 990, 997, 195 Cal.Rptr. 567, 540 (1983). The Court of Appeal also affirmed the trial court's award of damages in all respects, with the exception of certain overtime expenses.

The Respondents sought review of the Court of Appeal's decision by filing a Petition for Hearing in November, 1983. In January, 1984, the California Supreme Court granted the hearing, and on May 13, 1985 the Court issued its decision.[7] The California Supreme Court reversed the Court of Appeal and held, in a plurality opinion, that public sector employees have the right to strike unless the strike creates a "substantial and imminent threat" to the health or safety of the public. On May 24, 1985, the District filed a Petition for Rehearing before the California Supreme Court. On June 27, 1985, the Court denied the District's Petition.[8]

REASON FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

I

THE NOVEL AND UNPRECEDENTED DECISION OF THE CALIFORNIA SUPREME COURT PRESENTS AN EXTREMELY IMPORTANT FEDERAL QUESTION WHICH MUST BE RESOLVED BY THIS COURT

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[7] The California Supreme Court's decision is reprinted as Appendix A.

[8] The California Supreme Court's denial of the District's Petition for Rehearing is reprinted as Appendix G.

A. THE COURT'S DECISION PRESENTS A SUBSTANTIAL CONFLICT WITH THE FEDERAL WATER POLLUTION CONTROL ACT.

The preeminence of protecting the nation's environment, especially the nation's waterways, is demonstrated by the pervasive nature of the Federal Water Pollution Control Act ("Act") and the regulations promulgated pursuant to the Act. *See United States v. Ashland Oil and Transportation*, 504 F.2d 1317 (6th Cir. 1974). The California Supreme Court's decision granting sanitation workers the right to strike is in direct conflict with the declared goals and policies of the Act,[9] as well as the enforcement scheme embodied in the Act. Under the California Supreme Court's decision, strikes by sanitation workers are not unlawful unless they pose a "substantial and imminent" threat to the health or safety of the public. As a result, a California trial court must proceed on a case-by-case basis to determine the legality of a strike by sanitation workers. If the trial court determines that the strike does not meet the new standard,

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[9] Section 1251 of the Act specifically declares:

> 1) [I]t is the national goal that the *discharge* of pollutants into the navigable waters be *eliminated* by 1985; 2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shell fish, and wild life and provides for recreation in and on the water be achieved by July 1, 1983; 3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited; . . . 5) it is the national policy that area wide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State. . . .

33 U.S.C. § 1251(a) (emphasis added).

it may not enjoin the strike even though, contrary to federal law, the strike may cause the District to discharge pollutants into waterways and the Pacific Ocean.

The goal of the Act is to *eliminate* the *discharge of pollutants* into the nation's waterways and oceans. 33 U.S.C. § 1251(a). To accomplish this goal, the Act prohibits the discharge of pollutants into waterways and establishes *strict liability* and substantial civil and criminal penalties for violations.[10] 33 U.S.C. §§ 1319, 1321. *See also United State v. Texas Pipeline*, 611 F.2d 345 (10th Cir. 1979); *United States v. Amoco Oil*, 580 F.Supp. 1042 (D. Mo. 1984); *United States v. Bradshaw*, 541 F.Supp. 884 (D. Md. 1982). However, a strike by sanitation workers is designed to force the District to cease operations and pump raw sewage into the waterways and Pacific Ocean.[11] Therefore, a strike, which is legalized by the California Supreme Court's decision, may force the District to violate the federal Act, and subject the District to substantial civil and/or criminal penalties. *See United States v. Phelps Dodge Corp.*, 391 F.Supp. 1181 (D. Ariz. 1975) (Administrator *must act* in case of *any* violations, but has alternative methods of acting, i.e., either by criminal or civil proceedings). *See also United States v. Frezzo Brothers*, 602

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[10] The Act directs the Administrator of the Environmental Protection Agency ("EPA"), the agency charged with enforcing the Act, to bring suit in United States District Court for any violations of the Act. *See United States v. Phelps Dodge Corp.*, 391 F.Supp. 1181 (D. Ariz. 1975). *See also United States v. Frezzo Brothers*, 602 F.2d 1123 (3d Cir. 1979), *cert. denied*, 444 U.S. 1074 (1979).

[11] As previously discussed, the primary purpose of a strike by sanitation workers, as evidenced by the attempted sabotage during the 1976 strike, would be to close down the District's sewage treatment facilities and cause raw, untreated sewage to flow into the nation's waterways, estuaries, and the Pacific Ocean.

F.2d 1123 (3d Cir. 1979), *cert. denied*, 444 U.S. 1074 (1979). Furthermore, because a trial court may find that the discharge of pollutants does not pose a "substantial and imminent" threat to the health or safety of the public and refuse to enjoin the strike, the District may be unable to stop the discharge of pollutants.[12] As a result, the District will be forced to violate the federal Act and be subjected to substantial civil and/or criminal liability by reason of conduct that the California Supreme Court has legalized.

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[12] The horrors which inadequate sewage treatment can inflict upon a community were amply chronicled in *People v. City of Los Angeles*, 83 Cal.App.2d 627, 631-632, 189 P.2d 489 (1948):

> A large portion of the sewage was not screened and some of the screen slots were larger than authorized, and frequently raw sewage was bypassed around the screen and discharged either into the submarine tube or directly on the beach. Garbage, fecal matter, solid matter and oily sludge, recognizable as of sewage origin, was visible on all the beaches of Santa Monica Bay from State Park Beach located at the mouth of Santa Monica Canyon south to Malaga Cove. The quality of water along the beach was not safe and suitable for bathing purposes as a result of such discharge and the bacterial count of *escherichia coli* had exceeded ten per cubic centimeter in an area extending along the beach for a distance of approximately ten miles from Brooks Avenue north of the Venice Pier in Los Angeles to 14th Street, north of the Hermosa Beach Pier in Hermosa Beach. . . . There was an objectionable odor condition in the waters and along the beach used by the public. The operation of the treatment works and the disposal of screenings had been conducted in such a manner that it was a menace to public health and had created an offensive odor nuisance.

See also State of California v. City and County of San Francisco, 94 Cal.App.3d 522, 156 Cal.Rptr. 542 (1979) (graphic illustration of the effects of pumping raw sewage into the San Francisco Bay).

In conclusion, the California Supreme Court's decision establishes a new standard that is in direct contravention of the goals, objectives, and standards embodied in federal law.

B. THE COURT'S DECISION PRESENTS A SUBSTANTIAL CONFLICT AND POTENTIAL UNDERMINING OF THE FEDERAL RESOURCE CONSERVATION AND RECOVERY ACT OF 1976.

The Federal Resource Conservation and Recovery Act of 1976 ("Recovery Act"), and the regulations promulgated pursuant to the Recovery Act establish a comprehensive regulatory scheme for the disposal of solid wastes. One of the declared objectives of the legislation is to "[prohibit] future *open dumping* on the land and [to require] the conversion of existing open dumps to facilities which do not pose a danger to the environment or to health." 42 U.S.C. § 6902 (emphasis added). As explained below, the California Supreme Court's decision is in direct contravention of that objective and other specific provisions of the Act and regulations.

Section 6944 of the Recovery Act charged the Administrator of the EPA, the agency responsible for enforcing the Recovery Act, to develop regulations containing criteria for determining whether disposal facilities should be classified as "sanitary landfills" or "open dumps" for purposes of the Recovery Act.

Pursuant to Section 6944, the Administrator developed comprehensive regulations detailing the recommended procedures for the disposal of "municipal solid waste." *See*

40 C.F.R. §§ 241.100 - 241.212-3.[13] These regulations delineate the "minimum levels of performance required of any solid waste land disposal site operation." 40 C.F.R. § 241.100(b). Part 257 of the regulations establishes criteria for the classification of solid waste disposal facilities and practices. *See, e.g.*, 40 C.F.R. § 257.3-8 regarding limitations on the concentration of explosive gases. If these regulations are not adhered to, the site will not be classified as a "sanitary landfill" for purposes of the Recovery Act. Rather, the site will be considered an "open dump" and in violation of the regulations. 40 C.F.R. §§ 257.1 - 257.4.[14] Furthermore, failure to adhere to the regulations could lead to a violation of Section 6943 of the Recovery Act.[15]

Because the purpose of a strike by sanitation workers would be to curtail operations at the sanitary landfills, such disruption may cause the District to operate the landfills in a manner that fails to comply with the EPA's regulations. This potential noncompliance could cause the landfills to be considered open dumps which would be in direct violation of the purposes and objectives of the Recovery Act. As a result, the California Supreme Court's legalization of strikes by sanitation workers is in direct conflict with this vital federal law.

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[13] These regulations are reprinted as Appendix H.

[14] These regulations are reprinted as Appendix H.

[15] The Recovery Act provides for the establishment of state plans for the disposal of solid wastes. Section 6943 establishes the minimum requirements for these state plans. Section 6943 provides that such state plans must *prohibit* the establishment of new *open dumps* and requires that solid wastes be disposed of in sanitary landfills or in an otherwise environmentally sound manner. 42 U.S.C. § 6943(2).

C. STATE ACTION MUST GIVE WAY TO FEDERAL LEGISLATION WHERE A VALID ACT OF CONGRESS FAIRLY INTERPRETED IS IN CONFLICT WITH THE LAW OF THE STATE.

This Court has long recognized that state laws that "interfere with, or are contrary to the law of Congress" must yield to the federal legislation. *See Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). Indeed, the state and federal laws need not be contradictory on their face for the federal laws to supersede. The state law may be struck down if it is in "actual conflict" with the *objectives* that underlie the federal enactments. *See Nash v. Florida Industrial Commission*, 389 U.S. 235 (1967).

Furthermore, state action has been held preempted as interfering with federal legislation if it encourages conduct whose absence would aid in the effectuation of the federal scheme as interpreted and applied. *See Jones v. Rath Packing Co.*, 430 U.S. 519 (1977); *City of Burbank v. Lockheed Air Terminal Inc.*, 411 U.S. 624 (1973).

It is obvious that the California Supreme Court adopted its new standard without regard to any of the public agencies which are obligated to comply with federal laws that are inconsistent with the state court's standard. When the principles of federal preemption are applied to this case, this Court can only conclude that the California Supreme Court's decision is in conflict with federal law. As previously discussed, the Federal Water Pollution Control Act establishes a pervasive regulatory scheme to prevent the discharge of pollutants into the nation's waterways. To effectuate this purpose, the Administrator has promulgated detailed regulations and has actively prosecuted violators of

the Act. However, the California Supreme Court's decision directly conflicts with the purpose of the federal legislation to eliminate discharges of pollutants into the nation's waterways because it encourages activity, namely strikes by sanitation workers, designed to cause the discharge of pollutants into the state's waterways. The California Supreme Court's decision is also in contravention of the purposes of the federal Recovery Act and could result in solid waste disposal which is contrary to the EPA's regulations. The state court's decision thereby encourages conduct, strikes by sanitation workers, whose absence would aid in the effectuation of the federal pollution laws and regulations.

II

THE FEDERAL QUESTION WAS TIMELY RAISED BEFORE THE CALIFORNIA SUPREME COURT.

The federal question in this case was timely raised in the District's Petition for Rehearing.[16] It is well established that the federal question may be raised for the first time in the Petition for Rehearing when the federal question is created by an unexpected decision of the state court, giving the litigant no prior opportunity to anticipate or assert the particular federal question. *See Brinkerhoff-Faris Trust Co. v. Hill*, 281 U.S. 673, 677-78 (1930). *See also Missouri v. Gehner*, 281 U.S. 313 (1929).

In this case, the California Supreme Court reversed the state's common law and, in an unprecedented decision,

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[16] The Petition for Rehearing is reprinted as Appendix F.

afforded public employees the right to strike. The California Supreme Court also articulated a standard to be used to determine the legality of public employee strikes. The District had absolutely no forewarning that the Supreme Court would reverse the common law and articulate a new standard for determining the legality of public sector strikes. The state court's decision was unprecedented in that no other states had expressly given public sector employees the right to strike by judicial decree.

As a result, the federal question was timely raised in the state court below and this Court has jurisdiction to review that decision. The District could not have anticipated in 1976, that the state Supreme Court would reverse the law and articulate a new standard approximately nine years later. Indeed, the District should not have been expected to anticipate the federal question and raise it at that time. A contrary conclusion would result in a cluttering of federal issues at the trial level that "may" be decided in the future and that "may" give rise to a federal question. *See Herndon v. Georgia*, 295 U.S. 441 (1935) (Cardozo dissent).

Finally, the California Supreme Court's failure to address the federal question in its denial of the Petition for Rehearing does not prevent this Court from granting certiorari. It is well-established that a state court's refusal or failure to articulate its denial of the federal claims is just as reviewable as an express decision on point. *See Chambers v. Mississippi*, 410 U.S. 284, 290 n.3 (1973); *Street v. New York*, 394 U.S. 576, 581-85 (1969); *New York ex. rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928).

III.

CONCLUSION

For the reasons stated herein, Petitioner respectfully requests this Court to grant its Petition For a Writ of Certiorari to the Supreme Court of the State of California.

Respectfully submitted,

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APPENDIX A

[L.A. No. 31850, May 13, 1985.]

COUNTY SANITATION DISTRICT NO. 2 OF LOS ANGELES COUNTY, Plaintiff and Respondent, v. LOS ANGELES COUNTY EMPLOYEES' ASSOCIATION, LOCAL 660, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO et al., Defendants and Appellants.

Summary

The trial court, in a tort action, awarded a county sanitation district damages and prejudgment interest against a county employees' union in connection with the union's involvement in a labor strike against the district. The trial court found the strike to be unlawful and violation of the public policy of the state. (Superior Court of Los Angeles County, No. C 166219, Charles H. Older, Judge.)

The Supreme Court reversed, holding the common law prohibition against public sector strikes should not be recognized, that strikes by public sector employees as such are neither illegal nor tortious under California common law, and that it is not unlawful for public employees to engage in a concerted work stoppage for the purpose of improving their wages or conditions of empioyment, unless it has been determined that the work stoppage poses an imminent threat to public health or safety. It held that the right of public employees to strike is not unlimited, and that the Legislature could conclude that certain categories of public employees perform such essential services that a strike would invariably result in imminent danger to the public health and safety, and must therefore be prohibited. It held the courts must proceed on a case-by-case basis.

(Opinion by Broussard, J., with Mosk and Grodin, JJ., concurring. Separate concurring opinion by Kaus, J., with Reynoso, J., concurring. Separate concurring opinion by Bird, C.J. Separate concurring opinion by Grodin, J. Separate dissenting opinion by Lucas, J.)

HEADNOTES

Classified to California Digest of Official Report, 3d Series

(1a, 1b) Labor § 47—Labor Disputes—Strikes Against Public Entity—Fire Fighters—With the exception of fire fighters (Lab. Code, § 1962), no statutory prohibition against strikes by public employees exists in the state.

(2a, 2b) Labor § 47—Labor Disputes—Strikes Against Public Entity—The fact that Gov. Code, § 3509, specifically precluding the application to public employees of Lab. Code, § 923, construed to protect the right of private sector employees to strike, is not to be viewed as a general prohibition on the right of public employees to strike.

(3a-3c) Labor § 47—Labor Disputes—Strikes Against Public Entity — Common Law Prohibition — Rationale.—The common law prohibition against public employee strikes is not supported by the four policy rationales and justifications advanced in its support, namely that a strike by public employees is tantamount to a denial of governmental authority or sovereignty; the terms of public employment are not subject to bilateral collective bargaining, as in the private sector, since they are set by the legislative body through unilateral lawmaking; that granting public employees the right to strike would afford them excessive bargaining leverage, since legislative bodies are responsible for public employment decisionmaking, and

would result in distortion of the political process and an improper delegation of legislative authority; and that public employees provide the central public services which, if interrupted by strikes, would threaten the public welfare.

(4a, 4b) Courts § 32—Decisions and Orders—Power and Duty of Courts—Rejection of Common Law Doctrine—Public Employee Strikes.—The judiciary, and not only the Legislature, can reject the common law doctrine prohibiting public employee strikes. Legislative silence is not the equivalent of positive legislation and does not preclude judicial reevaluation of common law doctrine. Courts may modify, or even abolish the common law rule when reason or equity demand it, or when its underlying principles are no longer justifiable in light of modern society.

(5a, 5b) Courts § 32—Decisions and Orders—Power and Duty of Courts—Legislative Inaction.—When the law governing a subject has been shaped and guided by judicial decision, legislative inaction does not necessarily constitute a tacit endorsement of the precise stage in the evolution of the law extant at the time the Legislature did nothing; it may signify that the Legislature is willing to entrust the further evolution of legal doctrine to judicial development.

(6a-6c) Labor § 47—Labor Disputes—Strikes Against Public Entity—Common Law Prohibition.—There is no common law prohibition against public sector strikes, such strikes are not tortious under California common law, and it is not unlawful for public employees to engage in a concerted work stoppage for the purpose of improving their wages or conditions of employment, unless it has been determined that the work stoppage poses an imminent threat to public health or safety. Accordingly, a county sanitation district was not entitled to damages and

prejudgment interest awarded against a public employees union predicated on the premise its strike against the district was illegal under the common law prohibition.

[Labor law: Right of public employees to strike or engage in work stoppage, note, 37 **A.L.R.3d** 1147; see also **Cal.Jur.3d,** Labor, § 191; **Am.Jur.2d,** Labor and Labor Relations, § 1734.]

(7a, 7b) Labor § 13—Labor Unions—Fundamental Right of Workers.—The right to form and be represented by unions is a fundamental right of American workers that has been extended to public employees through constitutional adjudication as well as by statute.

(8a, 8b) Labor § 14—Labor Unions—Nature and Purpose—Economic Pressure.—Workmen may lawfully combine to exert various forms of economic pressure on an employer, provided the object sought to be accomplished thereby has a reasonable relation to the betterment of labor conditions, and they act peaceably and honestly. This right is guaranteed by the federal Constitution as an incident of freedom of speech, press and assemblage, and it is not dependent on the existence of a labor controversy between the employer and his employee.

(9a, 9b) Constitutional Law § 61—First Amendment and Other Fundamental Rights of Citizens—Governmental Regulation and Restriction of Fundamental Rights — Necessity for Specificity—Freedom of Association.—Even where a compelling state purpose is present, restrictions on the freedom of association protected by U.S. Const., 1st Amend., and made applicable to the states by U.S. Const., 14th Amend., must be drawn with narrow specificity. First Amendment freedoms are delicate and vulnerable and must be protected wherever possible. When government seeks to limit those freedoms on the basis of legitimate and

substantial governmental purposes those purposes cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. Precision of regulation is required so that the exercise of precious freedoms will not be unduly curtailed except to the extent necessitated by the legitimate governmental objective.

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OPINION

BROUSSARD, J.—Defendants appeal from a judgment awarding plaintiff sanitation district damages and prejudgment interest in connection with defendant union's involvement in a labor strike against plaintiff. The case squarely presents issues of great import to public sector labor-management relations, namely whether all strikes by public employees are illegal and, if so, whether the striking union is liable in tort for compensatory damages. After careful review of a long line of case law and policy arguments, we conclude that the common law prohibition against all public employee strikes is no longer supportable. Therefore, the judgment for the plaintiff finding the strike to be unlawful and awarding damages, interest and costs must be reversed.

I. Statement of the Case.

Defendant union (Local 660 or the union) is a labor organization affiliated with the Service Employees International Union, AFL-CIO, and has been the certified bargaining representative of the blue collar employees of the Los Angeles Sanitation District since 1973. Plaintiff is one of 27 sanitation districts within Los Angeles County[1] and is charged with providing, operating and maintaining

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[1] Each such district is a separate and autonomous political subdivision of the State of California, authorized by Health and Safety Code section 4700 et seq. County Sanitation District No. 2 of Los Angeles County is authorized by a joint powers agreement to act on behalf of itself and the 26 other districts in numerous matters, including personnel and labor relations. (These 27 sanitation districts are hereinafter jointly referred to as the District.)

sewage transport and treatment facilities and landfill disposal sites throughout the county.[2] The District employs some 500 workers who are directly or indirectly responsible for the operation and maintenance of its facilities and who are members of, or represented by, Local 660. Since 1973, the District and Local 660 have bargained concerning wages, hours and working conditions pursuant to the Meyers-Milias-Brown Act (MMBA). (Gov. Code §§ 3500-3511.) Each year these negotiations have resulted in a binding labor contract or memorandum of understanding (MOU). (See *Glendale City Employees' Assn. v. City of Glendale* (1975) 15 Cal.3d 328 [124 Cal.Rptr. 513, 540 P.2d 609].)

On July 5, 1976, approximatley 75 percent of the District's employees went out on strike after negotiations between the District and the union for a new wage and benefit agreement reached an impasse and failed to produce a new MOU. The District promptly filed a complaint for injunctive relief and damages and was granted a temporary restraining order. The strike continued for approximately 11 days, during which time the District was able to maintain its facilities and operations through the efforts of management personnel and certain union members who chose not to strike.[3] On July 16, the employees voted to

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[2] In 1976, the facilities operated by the District included 6 sanitary landfills which together received about 15,000 tons of solid waste each day, 11 treatment plants processing 450 million gallons of raw sewage per day, 4 maintenance yards, and 46 pumping stations. In maintaining these operations, the District served approximately 4 million residents of the county.

[3] The union maintains that the strike settled on July 12, while the trial court's findings agreed with the District's contention that the strike settled on July 16. In addition, the District maintained that the strike

accept a tentative agreement on a new MOU, the terms of which were identical to the District's offer prior to the strike.

The District then proceeded with the instant action for tort damages. The trial court found the strike to be unlawful and in violation of the public policy of the State of California and thus awarded the District $246,904 in compensatory damages,[4] prejudgment interest in the amount of $87,615.22 and costs of $874.65.

II. The Traditional Prohibition Against Public Employee Strikes.

Common law decisions in other jurisdictions at one time held that no employee, whether public or private, had a right to strike in concert with fellow workers. In fact, such collective action was generally viewed as a conspiracy and held subject to both civil and criminal sanctions.[5] Over the course of the 20th century, however, courts and legislatures gradually acted to change these laws as they applied to private sector employees; today, the right to strike is

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was not entirely peaceful and had alleged various acts of vandalism were committed by the strikers. The union denied these charges in full.

[4] This figure represents the following strike-related damages: Wages and FICA payments: $304,227; earned compensatory time off valued at $16,040; miscellaneous security, equipment and meal expenses: $55,080; health care benefits paid to striking employees: $6,000; less a $134,443 set off in wages, FICA and retirement benefits that the District did not have to pay out on behalf of striking workers.

[5] See *Commonwealth v. Pullis* (Mayor's Ct. Phil. 91806) reported in 3 Commons, Documentary History of American Industrial Society (1910) p. 59; *Walker v. Cronin* (1871) 107 Mass. 555; *Vegelahn v. Guntner* (1896) 1 67 Mass. 92 [44 N.E. 1077]; *Loewe v. Lawlor* (1908) 208 U.S. 274 [52 L.Ed.488, 28 S.Ct. 301].

generally accepted as indispensable to the system of collective bargaining and negotiation, which characterizes labor-management relations in the private sector.[6]

By contrast, American law continues to regard public sector strikes in a substantially different manner. A strike by employees of the United States government may still be treated as a crime,[7] and strikes by state and local employees have been explicitly allowed by courts or statute in only 10 states.[8]

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[6] Congress gradually, through a series of legislative enactments, not only granted private sector employees a right to strike and to engage in other concerted activities, but also deprived employers of their traditional remedies of injunction and damage suits. (See 38 Stat. 730 (1914) [Clayton Antitrust Act], codified as amended at 15 U.S.C. §§ 15, 17, 26 (1970), 29 U.S.C. § 52 (1970); 47 Stat. 70 (1930) [Norris-La Guardia Act], codified at 29 U.S.C. §§ 101-115 (1970); 47 Stat., pt. II 577 (1926) [Railway Labor Act], codified as amended at 45 U.S.C. §§ 151-188 (1970); 49 Stat. 449 (1935) [Wagner Act], codified as amended at 29 U.S.C. §§ 141-197 (1970).

[7] Employees of the federal government are statutorily prohibited from striking under 5 United States Code section 7311 (1976), which prohibits an individual from holding a federal position if he "participates in a strike, or asserts the right to strike against the Government of the United States . . . ." In *United Federation of Postal Clerks v. Blount* (D.D.C. 1971) 325 F.Supp.879, affd., 404 U.S. 802 [30 L.Ed.2d 38, 92 S.Ct. 80] (1971), the court upheld the constitutionality of the strike prohibitions, yet declared unconstitutional the "wording insofar as it inhibits the *assertion* of the right to strike . . . ." (*Id.* at p. 881 [italics in original].) In 1947, Congress originally denied federal employees the right to strike in section 305 of the Labor Management Relations Act (Taft-Hartley Act), chapter 120, 61 Statutes at Large 136 (1947). This act was repealed and ultimately replaced by section 7311.

[8] Those 10 states are Alaska, Hawaii, Idaho, Illinois, Minnesota, Montana, Oregon, Pennsylvania, Vermont, and Wisconsin. (See further discussion below.) Interestingly, the United States is virtually alone among Western industrial nations in upholding a general prohibition of

Contrary to the assertions of the plaintiff as well as various holdings of the Court of Appeal,[9] this court has repeatedly stated that the legality of strikes by public employees in California has remained an open question. In *Los Angeles Met. Transit Authority v. Brotherhood of Railroad Trainmen* (1960) 54 Cal.2d 684, 687-688 [8 Cal.Rptr. 1, 355 P.2d 905], this court stated in dictum that "[i]n the absence of legislative authorization public employees in general do not have the right to strike . . ." but proceeded to hold that a statute affording public transit workers the right " 'to engage in other concerted activities for the purpose of collectively bargaining or other mutual aid or protection' " granted these employees a right to strike. However, in our very next opinion on the issue, *In re Berry* (1968) 68 Cal.2d 137 [65 Cal.Rptr. 273, 436 P.2d 273], we invalidated an injunction against striking public employees as unconstitutionally overbroad, and *expressly* reserved opinion on "the question whether strikes by public employees can be lawfully enjoined." (*Id.*, p. 151.)

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public employee strikes. Most European countries have permitted them, with certain limitations, for quite some time as has Canada. See, e.g., Anderson, *Strikes and Impasse Resolution in Public Employment* (1969) 67 Mich.L.Rev. 943, 961-964.

[9] See, e.g., *Stationary Engineers v. San Juan Water Dist.* (1979) 90 Cal.App.3d 796, 801 [153 Cal.Rptr. 666]; *Pasadena Unified Sch. Dist. v. Pasadena Federation of Teachers* (1977) 72 Cal.App.3d 100 [140 Cal.Rptr. 41]; *Service Employees' International Union, Local No. 22 v. Roseville Community Hosp.* (1972) 24 Cal.App.3d 400, 408 [101 Cal.Rptr. 69]; *Trustees of Cal. State Colleges v. Local 1352, S.F. State etc. Teachers* (1970) 13 Cal.App.3d 863, 867 [92 Cal.Rptr. 134]; *City of San Diego v. American Federation of State etc. Employees* (1970) 8 Cal.App.3d 308, 310 [87 Cal.Rptr. 258]; *Almond v. County of Sacramento* (1969) 276 Cal.App.2d 32, 35 [80 Cal.Rptr. 518].

In our next opportunity to examine public employee strikes, *City and County of San Francisco v. Cooper* (1975) 13 Cal.3d 898 [120 Cal.Rptr. 707, 534 P.2d 403], which involved a suit challenging the validity of a strike settlement agreement enacted by the city, we held only that such settlement agreements are valid. After noting the Court of Appeal holdings that public employee strikes are illegal and the employees' counterargument that such strikes are impliedly authorized by statute, our unanimous opinion declared that we had no occasion to resolve that controversy in that action. (*Id.*, p. 912.)

In a similar vein, this court has carefully and explicitly reserved judgment on the issue of the legality of public employee strikes on at least three other occasions in recent years.[10] Indeed, our reluctance to address the issue head-on has elicited critical commentary from both dissenting and concurring opinions, which have urged us to resolve the question once and for all.[11] While we had ample reason for deciding the aforementioned cases without determining the broader question of the right of public employees to strike, the instant case presents us with the proper circumstances for direct consideration of this fundamental issue.

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[10] *San Diego Teachers Assn. v. Superior Court* (1979) 24 Cal.3d 1 [154 Cal.Rptr. 893, 593 P.2d 838]; *El Rancho Unified School Dist. v. National Education Assn.* (1983) 33 Cal.3d 946 [192 Cal.Rptr. 123, 663 P.2d 893]; and *International Brotherhood of Electrical Workers v. City of Gridley* (1983) 34 Cal.3d 191 [193 Cal.Rptr. 518, 666 P.2d 960].

[11] See, e.g., dissenting opinion of Richardson, J., in *San Diego Teachers Assn. v. Superior Court, supra*, 24 Cal.3d 1 and concurring opinion of Richardson, J., in *El Rancho Unified School Dist. v. National Education Assn., supra*, 33 Cal.3d at page 962; where he stated that "[t]his court should no longer continue its hesitant, tentative ritual dance around the perimeter of this central legal principle. . . ."

Before commencing our discussion, however, we must note, that the Legislature has also chosen to reserve judgment on the general legality of strikes in the public sector. As Justice Grodin observed in his concurring opinion in *El Rancho Unified School Dist. v. National Education Assn., supra,* 33 Cal.3d 946, 964, "the Legislature itself has steadfastly refrained from providing clearcut guidance."

(1a) With the exception of firefighters (Lab. Code, § 1962), no statutory prohibition against strikes by public employees in this state exists.[12] The MMBA, the statute under which the present controversy arose, does not directly address the question of strikes.

The MMBA sets forth the rights of municipal and county employees in California.[13] (Gov. Code §§ 3500-3511.) The

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[12] For just one example, the Winton Act (former Ed. Code § 13080 et seq.), which governed the relationship between local school boards and teachers' unions, neither affirmed nor rejected the teachers' right to strike. In 1975 the Legislature repealed the Winton Act and added new provisions to the Government Code to establish an Education Employment Relations Board (see Gov. Code, § 3540 et seq.); the new enactment also does not prohibit strikes by teachers. It also bears mention that the California Assembly Advisory Council on Public Employee Relations in its final report of March 15, 1973, concluded that, "[s]ubject only to [certain specified] restrictions and limitations . . . public employees should have the right to strike" (p. 24) and proposed a statute to carry out these goals (appen. A). However, this proposed statute was never enacted into law, perhaps further reflecting a legislative decision to leave the ultimate determination of this thorny issue to the judiciary.

[13] The MMBA revised its predecessor, the Brown Act, in 1968. The MMBA amendments, however, apply only to local government employees because the MMBA deleted reference to the "State of California" and explicitly defined "public employee" as one employed by any political subdivision of the state. (See Gov. Code, § 3501.)

MMBA protects the right of such employees "to form, join, and participate in the activities of employee organizations . . . for the purpose of representation on all matters of employer-employee relations." It also requires public employers to "meet and confer" in good faith with employee representatives on all issues within the scope of representation. As explained in its preamble, one of the MMBA's main purposes is to improve communications between public employees and their employers by providing a reasonable method for resolving disputes. A further stated purpose is to promote improved personnel relations by "providing a uniform basis for recognizing the right of public employees to join organizations of their own choice.[14]

Presently, state employees are governed by the State Employer-Employee Relations Act (Gov. Code, §§ 3512-3524).

Additional groups of employees were excepted from coverage under the Brown Act by previous legislation. These employees are consequently not covered by the MMBA. (See Pub. Util. Code, §§ 25051-25052, added by Stats. 1955, ch. 1036, § 2 at pp. 1960-1961 [governing bargaining between employees of the Alameda-Contra Costa Transit District and their employers]; Pub. Util. Code, Appen. 1 § 3.6(b)-(g) [governing bargaining in the Los Angeles Metropolitan Transit Authority]; Ed. Code, §§ 13080-13089 [governing educational employees].)

For a detailed discussion of the scope and purposes of the MMBA, see Grodin, *Public Employees Bargaining in California: The Meyers-Milias-Brown Act in the Courts* (1972) 23 Hastings L.J. 719; Note, *Collective Bargaining Under the Meyers-Milias-Brown Act—Should Local Employees Have the Right to Strike* (1984) 35 Hastings L.J. 523.

[14] However, the MMBA contains no clear mechanism for resolving disputes. It merely provides that if the parties fail to reach an agreement, they *may* agree to appoint a mediator or use other impasse resolution procedures agreed upon by the parties. Additionally, the MMBA does not authorize the establishment of an administrative agency to resolve

On its face, the MMBA neither denies nor grants local employees the right to strike. This omission is noteworthy since the Legislature has not hesitated to expressly prohibit strikes for certain classes of public employees. For example, the above-noted prohibition against strikes by firefighters was enacted nine years before the passage of the MMBA and remains in effect today. Moreover, the MMBA includes firefighters within its provisions. Thus, the absence of any such limitation on other public employees covered by the MMBA at the very least implies a lack of legislative intent to use the MMBA to enact a general strike prohibition.[15]

(2a) Plaintiffs have suggested that section 3509 of the MMBA must be construed as a general prohibition on the right to strike because it specifically precludes the

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controversies arising under its provisions. In contrast, statutes governing other public employees in California authorize the Public Employee Relations Board (PERB) to resolve disputes and enforce the provisions of the legislation. (See Gov. Code, § 3541.3 (setting the powers and duties of the PERB under the Educational Employment Relations Act (EERA)); and Gov. Code, § 3513, subd. (g) [making the powers and duties of the PERB under the EERA applicable to the State Employees Relations Act].)

[15] Apparently this decision was the result of political compromise and/or a desire that the courts would take the difficult first step of unambiguously indicating whether public employees generally have the right to strike. As one noted commentator explains, "The entire subject of strikes and impasse resolution procedures is avoided, except for the declaration that the parties may elect to engage a mediator. What emerges is a rather general legislative blessing for collective bargaining at the local governmental level without clear delineation of policy or means for its implementation. The courts have, on the whole, done an admirable job of exegesis, but their decisions cannot help but reflect the underlying weakness of the text." (Grodin, *op. cit. supra*, 23 Hastings L.J. at p. 761.)

application of Labor Code section 923[16] to public employees. Labor Code section 923 has been construed by this court to protect the right of private sector employees to strike (see *Petri Cleaners, Inc. v. Automotive Employees, etc. Local No. 88* (1960) 53 Cal.2d 455 [2 Cal.Rptr. 470, 349 P.2d 76]); yet, an examination of other California statutes governing public employees makes it perfectly clear that section 3509 was *not* included in the MMBA as a means for prohibiting strikes.

A provision identical to section 3509 is contained in the statutes governing educational employees and firefighters. However, an explicit strike prohibition is included in the firefighters statute *in addition* to this provision. The fact that the Legislature felt it necessary to include this express strike prohibition clearly indicates that it neither intended nor expected its preclusion of section 923 to serve as a blanket prohibition against strikes. Furthermore, in *San Diego Teachers Assn. v. Superior Court, supra,* 24 Cal.3d at page 13, this court interpreted section 3549 of the EERA, a provision *identical to* section 3509 of the MMBA, as specifically *not* prohibiting strikes. Therefore, plaintiff's assertion that section 3509 must be read as a legislative prohibition of public employee strikes cannot be sustained.[17]

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[16] Section 923 provides in pertinent part: ". . . the individual workman [shall] have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference . . . of employers . . . in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

[17] Since the present case involves employees subject to the MMBA, we do not consider whether provisions of statutes governing other

In sum, the MMBA establishes a system of rights and protections for public employees which closely mirrors those enjoyed by workers in the private sector. The Legislature, however, intentionally avoided the inclusion of any provision which could be construed as either a blanket grant or prohibition of a right to strike, thus leaving the issue shrouded in ambiguity. In the absence of clear legislative directive on this crucial matter, it becomes the task of the judiciary to determine whether, under the law, strikes by public employees should be viewed as a prohibited tort.

III. The Common Law Prohibition Against Public Employee Strikes.

(3a) As noted above, the Court of Appeal and various lower courts in this and other jurisdictions have repeatedly stated that, absent a specific statutory grant, all strikes by public employees are per se illegal. A variety of policy rationales and legal justifications have traditionally been advanced in support of this common law "rule," and numerous articles and scholarly treatises have been devoted to debating their respective merits.[18] The various

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employees could be interpreted to limit the right of such employees to strike.

[18] Among the more notable works to appear recently on the subject of labor relations in the public sector are: Hanslowe & Acierno, *The Law and Theory of Strikes By Government Employees* (1982) 67 Cornell L.Rev. 1055; Comment, *Public Employee Legislation: An Emerging Paradox, Impact, and Opportunity* (1976) 13 San Diego L.Rev. 931; Comment, *California Assembly Advisory Council's Recommendations on Impasse Resolution Procedures and Public Employee Strikes* (1974) 11 San Diego L.Rev. 473; Comment, *The Collective Bargaining Process at the Municipal Level Lingers in Its Chrysalis Stage* (1974)

justifications for the common law prohibition can be summarized into four basic arguments. First—the traditional justification—that a strike by public employees is tantamount to a denial of governmental authority/sovereignty. Second, the terms of public employment are not subject to bilateral collective bargaining, as in the private sector, because they are set by the legislative body through unilateral lawmaking. Third, since legislative bodies are responsible for public employment decision-making, granting public employees the right to strike would afford them excessive bargaining leverage, resulting in a distortion of the political process and an improper delegation of legislative authority. Finally, public employees provide essential public services which, if interrupted by strikes, would threaten the public welfare.

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14 Santa Clara Law. 397; Grodin, *Public Employee Bargaining in California: The Meyers-Milias-Brown Act in the Courts* (1972) 23 Hastings L.J. 719; Shaw & Clark, *The Practical Differences Between Public and Private Sector Collective Bargaining* (1972) 19 UCLA L.Rev. 867; Lev, *Strikes by Government Employees: Problems and Solutions* (1971) 57 A.B.A.J. 771; Witt, *The Public Sector Strike: Dilemma of the Seventies* (1971) 8 Cal. Western L.Rev. 102; Bernstein, *Alternatives to the Strike in Public Labor Relations* (1971) 85 Harv.L.Rev. 459; Burton & Krider, *The Role and Consequences of Strikes by Public Employees* (1970) 79 Yale L.J. 418; Wellington & Winter, *More on Strikes by Public Employees* (1970) 79 Yale L.J. 441; Kheel, *Strikes and Public Employment* (1969) 67 Mich.L.Rev. 931; Anderson, *Strikes and Impasse Resolution in Public Employment* (1969) 67 Mich.L.Rev. 943; Wellington & Winter, *The Limits of Collective Bargaining in Public Employment* (1969) 78 Yale L.J. 1107; Thorne, *The Government Employee and Organized Labor* (1962) 2 Santa Clara Law. 147; Note, *Labor Relations in the Public Service* (1961) 75 Harv.L.Rev. 391; Annot., Labor Law: Right of Public Employees to Strike or Engage in Work Stoppage (1971) 37 A.L.R.3d 1147.

Our determination of the legality of strikes by public employees necessarily involves an analysis of the reasoning and current viability of each of these arguments. The first of these justifications, the sovereignty argument, asserts that government is the embodiment of the people, and hence those entrusted to carry out its function may not impede it.[19] This argument was particularly popular in the first half of the 20th century, when it received support from several American Presidents.[20]

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[19] For example, in *City of Cleveland v. Division 268 of Amal. Ass'n* (1949) 41 Ohio Ops. 236, 239 [90 N.E.2d 711,715], the court stated that "[i]t is clear that in our system of government, the government is a servant of all of the people. And a strike against the public, a strike of public employees, has been denominated . . . as a rebellion against government. The right to strike, if accorded to public employees . . . is one means of destroying government. And if they destroy government, we have anarchy, we have chaos." A California case which relied on this sovereignty argument is *Nutter v. City of Santa Monica* (1946) 74 Cal.App.2d 292 [168 Cal.Rptr. 741].

[20] Commenting on the Boston police strike, Calvin Coolidge asserted that "[t]here is no right to strike against public safety by anybody, anywhere, at any time" (quoted in *Norwalk Teachers Ass'n v. Board of Education (1951) 138 Conn. 269, 273 [83 A.2d 482, 484, 31 A.L.R.2d 1133]). Woodrow Wilson, commenting on the same strike, stated that the strike is " 'an intolerable crime against civilization' " (quoted in id.*, at p. 273 [83 A.2d at p. 484]).

In another famous pronouncement of the sovereignty argument, President Franklin Roosevelt stated: " '[M]ilitant tactics have no place in the functions of any organization of Government employees. . . . [A] strike of public employees manifests nothing less than an intent on their part to prevent or obstruct the operations of Government until their demands are satisfied. Such action, looking toward the paralysis of Government by those who have sworn to support it, is unthinkable and intolerable.' " (*Id.*, at pp. 273-274 [83 A.2d at p. 484] [quoting a letter from President Roosevelt to the president of the National Federation of Federal Employees (Aug. 16, 1937)].)

The sovereignty concept, however, has often been criticized in recent years as a vague and outdated theory based on the assumption that "the King can do no wrong." As Judge Harry T. Edwards has cogently observed, "the application of the strict sovereignty notion—that governmental power can never be opposed by employee organizations—is clearly a vestige from another era, an era of unexpanded government. . . . With the rapid growth of the government, both in sheer size as well as in terms of assuming services not traditionally associated with the 'sovereign,' government employees understandably no longer feel constrained by a notion that 'The King can do no wrong.' The distraught cries by public unions of disparate treatment merely reflect the fact that, for all intents and purposes, public employees occupy essentially the same position vis a vis the employer as their private counterparts." (Edwards, *The Developing Labor Relations Law in the Public Sector* (1972) 10 Duq.L.Rev. 357, 359-360.)[21]

In recent years, courts have rejected the very same concept of sovereignty as a justification for governmental immunity from tort liability. In California, the death knell

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[21] See also *Anderson Fed. of Teach. v. School City of Anderson* (1969) 252 Ind. 588 [251 N.E. 2d 15, 20, 37 A.L.R.3d 1131] (dis. opn. of DeBruler, C.J.). ("[Sovereign immunity] is not a rational argument at all but a technique for avoiding dealing with the merits of the issue [of whether public employees may strike]. . . . The conflict of real social forces cannot be solved by the invocation of magical phrases like 'sovereignty.' ")

Chief Justice DeBruler also notes that where the government has discretion over the terms and conditions of employment, "[a]ny decision within this discretionary area is authorized by the government, and therefore, obviously does not deny the authority of government." (*Id.*, at p. 20.)

came in *Muskopf v. Corning Hospital Dist.* (1961) 55 Cal.2d 211 [11 Cal.Rptr. 89, 359 P.2d 457], where this court stated that, "[t]he rule of governmental immunity for tort is an anachronism, without rational basis, and has existed only by the force of inertia." (55 Cal.2d at p. 216.) As noted by this court in *Muskopf*, perpetuation of the doctrine of sovereign immunity in tort law led to many inequities, and its application effected many incongruous results. Similarly, the use of this archaic concept to justify a per se prohibition against public employee strikes is inconsistent with modern social reality and should be hereafter laid to rest.

The second basic argument underlying the common law prohibition of public employee strikes holds that since the terms of public employment are fixed by the Legislature, public employers are virtually powerless to respond to strike pressure, or alternatively that allowing such strikes would result in "government by contract" instead of "government by law." (See *City of L.A. v. Los Angeles etc. Council* (1949) 94 Cal.App.2d 36, 46 [210 P.2d 305].) This justification may have had some merit before the California Legislature gave extensive bargaining rights to public employees. However, at present, most terms and conditions of public employment are arrived at through collective bargaining under such statutes as the MMBA.

We have already seen that the MMBA establishes a variety of rights and protections for public employees—including the right to join and participate in union activities and to meet and confer with employer representatives for the purpose of resolving disputed labor-management issues. The importance of mandating these rights, particularly the meet and confer requirement, cannot be ignored. The overall framework of the MMBA represents a nearly exact parallel to the private sector

system of collective bargaining—a system which sets forth the guidelines for labor-management relations in the private sphere and which protects the right of private employees to strike. By enacting these significant and parallel protections for public employees through the MMBA, the Legislature effectively removed many of the underpinnings of the common law per se ban against public employee strikes. While the MMBA does not directly address the issue of such strikes, its implications regarding the traditional common law prohibition are significant.

This argument was eloquently explained by Justice Grodin in his concurring opinion in *El Rancho Unified Sch. Dist. v. National Education Assn., supra,* 33 Cal.3d at page 963, where he pointed out that "[t]he premise underlying the court's opinion in *City of L.A.* [94 Cal.App.2d 36]—that it is necessarily contrary to public policy to establish terms and conditions of employment for public employees through the bilateral process of collective bargaining rather than through unilateral lawmaking—has since been rejected by the Legislature. The heart of the statute under consideration in this case [the Educational Employment Relations Act], for example, contemplates that matters relating to wages, hours, and certain other terms and conditions of employment for teachers will be the subject of negotiation and agreement between a public school employer and organizations representing its employees. (Gov. Code, §§ 3543.2, 3543.3, 3543.7.) Thus, the original policy foundation for the 'rule' that public employee strikes are illegal in this state has been substantially undermined, if not obliterated."

The remaining two arguments have not served in this state as grounds for asserting a ban on public employee strikes but have been advanced by commentators and by

courts of other states. With the traditional reasons for prohibiting such strikes debunked, these additional reasons do not convince us of the necessity of a judicial ukase prohibiting all such strikes.

The first of these arguments draws upon the different roles of market forces in the private and public spheres. This rationale suggests that because government services are essential and demand is generally inelastic, public employees would wield excessive bargaining power if allowed to strike. Proponents of this argument assume that economic constraints are not present to any meaningful degree in the public sector. Consequently, in the absence of such constraints, public employers will be forced to make abnormally large concessions to workers, which in turn will distort our political process by forcing either higher taxes or a redistribution of resources between government services.[22]

There are, however, several fundamental problems with this "distortion of the political process" argument. For one, as will be discussed more fully below, a key assumption underlying the argument—that all government services are essential—is factually unsupportable. Modern governments engage in an enormous number and variety of functions, which clearly vary as to their degree of essentiality. As such, the absence of an unavoidable nexus between most

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[22] See e.g., *United Federation of Postal Clerks v. Blount, supra,* 325 F.Supp. 879, 884. ("In the private sphere, the strike is used to equalize bargaining power, but this has universally been held not to be appropriate when its object and purpose can only be to influence the essentially political decisions of Government in the allocation of its resources.")

For an even more extensive elaboration of this "distortion of the political process" argument, see Wellington & Winter, *The Limits of Collective Bargaining in Public Employment, supra,* 78 Yale L.J. 1107.

public services and essentially necessarily undercuts the notion that public officials will be forced to settle strikes quickly and at any cost. The recent case of the air-traffic controllers' strike[23] is yet another example that governments have the ability to hold firm against a strike for a considerable period, even in the face of substantial inconvenience. As this court concluded in *Los Angeles Met. Transit Authority v. Brotherhood of Railroad Trainmen, supra*, "Permitting employees to strike does *not* delegate to them authority to fix their own wages to the exclusion of the employer's discretion. In collective bargaining negotiations, whether or not the employees strike, the employer is free to reject demands if he determines that they are unacceptable." (54 Cal.2d at p. 693, italics added.)

Other factors also serve to temper the potential bargaining power of striking public employees and thus enable public officials to resist excessive demands: First, wages lost due to strikes are as important to public employees as they are to private employees. Second, the public's concern over increasing tax rates will serve to prevent the decisionmaking process from being dominated

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[23] In August 1981, the Professional Air Traffic Controllers Organization (PATCO) launched a nationwide strike against the federal government. President Ronald Reagan ordered the discharge of 11,000 striking controllers who had not returned to work within a two-day grace period. Up to the time of this writing, the Administration has rejected all suggestions for a general amnesty, its position being that the strikers, by violating the federal government's prohibition on strikes and their own "no strike" oath, have forfeited their jobs with the Federal Aviation Administration forever. Federal courts upheld the government's position in *PATCO v. Federal Labor Relations Authority* (D.C. Cir. 1982) 685 F.2d 547. For a more detailed analysis of the strike, see Meltzer & Sunstein, *Public Employee Strikes, Executive Discretion, and the Air Traffic Controllers* (1983) 50 U.Chi.L.Rev. 731.

by political instead of economic considerations. A third and related economic constraint arises in such areas as water, sewage and, in some instances, sanitation services, where explicit prices are charged. Even if representatives of groups other than employees and the employer do not formally enter the bargaining process, both union and local government representatives are aware of the economic implications of bargaining which leads to higher prices which are clearly visible to the public. A fourth economic constraint on public employees exists in those services where subcontracting to the private sector is a realistic alternative. For example, Warren, Michigan resolved a bargaining impasse with an American Federation of State, County and Municipal Employees (AFSCME) local by subcontracting its entire sanitation service; Santa Monica, California, ended a strike of city employees by threatening to subcontract its sanitation operations; in fact, San Francisco has chosen to subcontract its entire sanitation system to *private* firms. If this subcontract option is preserved, wages in the public sector clearly need not exceed the rate at which subcontracting becomes a realistic alternative.[24]

The proponents of a flat ban on public employee strikes not only ignore such factors as the availability of subcontracting, but also fail to adequately consider public sentiment towards most strikes and assume that the public will push blindly for an early resolution at any cost. In fact, public sentiment toward a strike often limits the pressure felt by political leaders, thereby reducing the strike's

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[24] See further discussion in Burton & Krider, *The Role and Consequences of Strikes by Public Employees, supra*, 79 Yale L.J. 418, 425-427.

effectiveness. A Pennsylvania Governor's Commission Report stressed just such public sentiment as an important reason to *grant* a limited right to strike: "[T]he limitations on the right to strike which we propose . . . will appeal to the general public as so much fairer than a general ban on strikes that the public will be less likely to tolerate strikes beyond these boundaries. Strikes can only be effective so long as they have public support. *In short, we look upon the limited and carefully defined right to strike as a safety valve that will in fact prevent strikes.*"[25] *(Italics in original.)*

In sum, there is little, if any empirical evidence which demonstrates that governments generally capitulate to unreasonable demands by public employers in order to resolve strikes. The result of the strike in the instant case clearly suggests the opposite. During the 11-day strike, negotiations resumed, and the parties subsequently reached an agreement on a new MOU, the terms of which were *precisely the same* as the District's last offer prior to the commencement of the strike. Such results certainly do not illustrate a situation where public employees wielded excessive bargaining power and thereby caused a distortion of our political process.

The fourth and final justification for the common law prohibition is that interruption of government services is unacceptable because they are essential. As noted above, in our contemporary industrial society the presumption of essentiality of most government services is questionable at

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[25] Governor's Commission to Revise the Public Employee Law of Pennsylvania, Report and Recommendations, reprinted in 251 Govt. Empl. Rel. Rep. (BNA) E-1, E-3 (1968). This report is discussed in detail in Hanslowe & Acierno, *The Law and Theory of Strikes by Government Employees, supra*, 67 Cornell L.Rev. 1055.

best. In addition, we tolerate strikes by private employees in many of the same areas in which government is engaged, such as transportation, health, education, and utilities; in many employment fields, public and private activity largely overlap.

In a dissenting opinion in *Anderson Fed. of Teach. v. School City of Anderson, supra,* Chief Justice DeBruler of Indiana observed that the source and management of most service enterprises is irrelevant to the relative essentiality of the services: "There is no difference in impact on the community between a strike by employees of a public utility and employees of a private utility; nor between employees of a municipal bus company and a privately owned bus company; nor between public school teachers and parochial school teachers. The form of ownership and management of the enterprise does not determine the amount of destruction caused by a strike of the employees of that enterprise. In addition, the form of ownership that is actually employed is often a political and historical accident, subject to future change by political forces. Services that were once rendered by public enterprise may be contracted out to private enterprise, and then by another administration returned to the public sector." (251 N.E.2d at p. 21.)

Recently, the United States Supreme Court also eschewed the classic equation of public ownership of an industry with the essentiality of that industry. In an earlier case which reflected the traditional reasoning, *United States v. Mineworkers* (1947) 330 U.S. 258 [91 L.Ed. 884, 67 S.Ct. 677], the Supreme Court had held that the government's wartime seizure of private coal mines rendered those mining operations public services and changed the rights of the miners, though the function of the

mines remained exactly the same. The court then approved the issuance of an injunction against striking workers, a remedy that would not have been available had the mines still been considered a private enterprise.

In the recent case of *Transportation Union v. Long Island R. Co.* (1982) 455 U.S. 678 [71 L.Ed.2d 547, 102 S.Ct. 1349], however, the court held that employees of a formerly private railroad, which had recently been acquired by a governmental entity, retained their right to strike under the Railway Labor Act. In this latter instance, the Supreme Court clearly recognized that the public takeover of the railroad did not necessarily change the rights of the employees; the court therefore suggested that the railroad became no more essential after its public acquisition. Although the decision's basis in the supremacy clause limits its direct precedential value on labor law, the ruling nevertheless signifies a major departure from the court's earlier holding in *United Mineworkers, supra*—that a service becomes essential once it comes under government control. The *United Transportation Union* case thus underscores the conclusion that it is *the nature of the service provided* which determines its essentiality and the impact of its disruption on the public welfare, as opposed to a simplistic determination of whether the service is provided by public or private employees. Indeed, strikes by private workers often pose a more serious threat to the public interest than would many of those which involve public employees.

We of course recognize that there are certain "essential" public services, the disruption of which would seriously threaten the public health or safety. In fact, defendant union itself concedes that the law should still act to render illegal any strikes in truly essential services which would constitute

a genuine threat to the public welfare. Therefore, to the extent that the "excessive bargaining power" and "interruption of essential services" arguments still have merit, specific health and safety limitations on the right to strike should suffice to answer the concerns underlying those arguments.

In addition to the various legal arguments advanced to persuade the courts to impose a judicial ban on public employee strikes—arguments which, as we have seen, are decidedly unpersuasive in the context of modern jurisprudence and experience—there is the broader concern that permitting public employees to strike may be, on balance, harmful to labor-management relations in the public sector. This is essentially a political argument, best addressed to the Legislature. We review the matter only to point out that the issue is not so clear cut as to justify judicial intervention, since the Legislature could reasonably conclude that recognizing public employees' right to strike may actually enhance labor-management relations.

At least 10 states have granted most of their public employees a right to strike;[26] and the policy rationale behind this statutory recognition further undercuts several of the basic premises relied upon by strike-ban advocates. As the aforementioned Pennsylvania Governor's Commission Report concluded: "The collective bargaining process

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[26] See footnote 8, *ante*, for a list of the 10 states. Typically these statutes permit public sector strikes, unless such strikes endanger the public health, safety, or welfare. The statutes generally prohibit strikes by police and fire-protection employees, employees in correctional facilities, and those in health-care institutions. In some instances, statutes provide binding arbitration to resolve certain disputes for which strikes are proscribed. Thus, the public sector strike has begun to achieve some degree of legitimacy, despite the strong opposition of critics.

will be strengthened if this qualified right to strike is recognized. It will be some curb on the possible intransigence of an employer; and the limitations on the right to strike will serve notice on the employee that there are limits to the hardships that he can impose." (251 Govt. Empl. Rel. Rep., *supra*, at p. E-3.)

It is unrealistic to assume that disputes among public employees and their employers will not occur; in fact, strikes by public employees are relatively frequent events in California. For example, 46 strikes occurred during 1981-1983, which actually marks a significant decline when compared to the number during the 5 previous years.[27] Although the circumstances behind each individual strike may vary somewhat, commentators repeatedly note that much of the reason for their occurrence lies in the fact that without the right to strike, or at least a credible strike threat, public employees have little negotiating strength. This, in turn, produces frustrations which exacerbate labor-management conflicts and often provoke "illegal" strikes.

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[27] Public employee strikes in California, 1970-1983:*

1970	1971	1972	1973	1974	1975	1976
20	14	18	15	45	44	23

1977	1978	1979	1980	1981	1982	1983
59	29	87	55	20	6	20

*Source: *An Analysis of 1981-1983 Strikes in California's Public Sector* (1984) (Mar. 1984 Inst. Of Ind. Rel., U.C. Berkeley) 60 Cal. Pub. Empl. Rel. 7, 9. Public employees include all workers in public agencies in California, excluding federal service and public utilities.

The noted labor mediator, Theodore W. Kheel, aptly described this process when analyzing New York's Taylor Law (which makes all public employee strikes illegal) and its resultant effect on labor relations in that state: "It would be unfair to place upon the legal machinery sole responsibility for these interruptions of critical services on which the welfare of New York depends. But the fact remains that the machinery—including the prohibition on strikes with attendant penalties and the fact-finding boards with their power to make recommendations—did not work to settle these disputes or stop the strikes, slowdowns, or threats. In fact it is probable that the Taylor Law exacerbated these conflicts. For one thing, it made subversive a form of conduct society endorsed for private workers. It encouraged unions to threaten to strike to achieve the bargaining position participants in collective bargaining must possess. It made the march to jail a martyr's procession and a badge of honor for union leaders. . . . . In simple point of fact, it did not and is not likely to work as a mechanism for resolving conflicts in public employment relations through joint determination, whether called collective bargaining or collective negotiations." (Kheel, *Strikes and Public Employment, supra,* 67 Mich.L.Rev. 931, 936.)[28]

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[28] Indeed the per se prohibition is notoriously ineffective. See Comment, *California Assembly Advisory Council's Recommendations on Impasse Resolution Procedures and Public Employee Strikes, supra,* 11 San Diego L.Rev. 473, 480. The council's study found that the "present laws do not deter strikes, and furthermore, that once an illegal strike is instituted the law has very little effect in compelling the strikers to return to work. Part of the reason for this is that many public employers hesitate to request an injunction because they believe that the employees would continue to strike, thereby forcing the employer to either initiate contempt proceedings and subject his employees to quasi-

It is universally recognized that in the private sector, the bilateral determination of wages and working conditions through a collective bargaining process, in which both sides possess relatively equal strength, facilitates understanding and more harmonious relations between employers and their employees. In the absence of some means of equalizing the parties' respective bargaining positions, such as credible strike threat, both sides are less likely to bargain in good faith;[29] this in turn leads to unsatisfactory and acrimonious labor relations and ironically to more and longer strikes. Equally as important, the possibility of a strike often provides the best impetus for parties to reach an agreement at the bargaining table, because *both* parties lose if a strike actually comes to pass. Thus by providing a clear incentive for resolving disputes, a credible strike threat may serve to avert, rather than to encourage, work stoppages.

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criminal penalties, or stand idly and ineffectually by as the illegal strike continues. Either of these alternatives, if pursued, would have a deleterious effect on future employee-management relations once the strike is settled."

See also statement of Professor Reginald Alleyne, UCLA Law School, in the Transcript of Proceedings, MMBA Hearing, California Legislative Assembly, Interim Public Employment and Retirement Committee, page 20. Professor Alleyne cited statistics which supported his view that "In 99 and 9/10 of the cases in the private sector they succeed and reach an agreement."

See also Cebulski, *An Analysis of 22 Illegal Strikes and California Law* (1973) 18 Cal. Pub. Empl. Rel. 2, 9 (chart showing that strikes in which public sector employers imposed legal sanctions lasted *twice as long* as strikes in which the employers did not attempt to impose sanctions).

[29] See, e.g., *Timberlane Reg. Sch. Dist. v. Timberlane Reg. Ed. Ass'n* (1974) 114 N.H. 245 [317 A.2d 555, 557].

Theodore Kheel has explained this argument very well: "[W]e should acknowledge the failure of unilateral determination, and turn instead to true collective bargaining, even though this must include the possibility of a strike. We would then clearly understand that we must seek to improve the bargaining process and the skill of the negotiators to prevent strikes. . . . With skillful and responsible negotiators, no machinery, no outsiders, and no fixed rules are needed to settle disputes. For too long our attention has been directed to the mechanics and penalties rather than to the participants in the process. It is now time to change that, to seek to prevent strikes by encouraging collective bargaining to the fullest extent possible."[30]

A final policy consideration in our analysis addresses a more philosophical issue—the perception that the right to strike, in the public sector as well as in the private sector, represents a basic civil liberty.[31] The widespread acceptance

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[30] Kheel, *op. cit. supra*, 67 Mich.L.Rev. at pages 940-941.

[31] Another interesting and related policy argument in support of granting a right to strike to public employees rests on a recognition of the changing shape and values of the American economic system itself. In essence, it focuses on the fact that our market economy has evolved from its classical model into an increasingly mixed and pluralistic form. In this process of increased government intervention, the line between public and private enterprise has become increasingly blurred. At the same time, a concomitant blurring has occurred between traditional political and economic activity, and it is this latter overlap which renders a flat ban on all public sector strikes so difficult to defend.

The argument then analogizes the deviation of the American system from classical economic models and the corresponding reevaluation of public strike prohibitions to the Solidarity-inspired developments in Poland prior to the latest military crackdown. Ironically, the traditional common law argument that public sector bargaining and striking is anti-democratic and inimical to our political process, closely mirrors the Polish government's view that unions and strikes are antisocial—indeed

of that perception leads logically to the conclusion that the right to strike, as an important symbol of a free society, should not be denied unless such a strike would substantially injure paramount interests of the larger community.

(4a) Plaintiff's argument that only the Legislature can reject the common law doctrine prohibiting public employee strikes flies squarely in the face of both logic and past precedent. Legislative silence is not the equivalent of positive legislation and does not preclude judicial reevaluation of common law doctrine. If the courts have created a bad rule or an outmoded one, the courts can change it.

This court has long recognized the need to redefine, modify or even abolish a common law rule "when reason or equity demand it" or when its underlying principles are no longer justifiable in light of modern society. (See *Rodriguez v. Bethlehem Steel Corp.* (1974) 12 Cal.3d 382, 394 [115 Cal.Rptr. 765, 525 P.2d 669]; *Muskopf v. Corning Hospital Dist.* (1961) 55 Cal.2d 211, 216 [11 Cal.Rptr. 89, 359 P.2d 457]; *Green v. Superior Court* (1974) 10 Cal.3d 616, 629 [111 Cal.Rptr. 704, 517 P.2d 1168]; *Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804, 808 [119 Cal.Rptr. 858, 532 P.2d 1226, 78 A.L.R.3d 393].)

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revisionist and reactionary—conduct in a system operated purportedly for the benefit of all. Deviations from classical models and beliefs thus confront both ideological viewpoints. The argument for a right to strike for public employees in a capitalist system clearly gains strength as society evolves away from the classical ideal of a pure market economy where the public and private sectors are clearly separated. Similarly, the case for a right to strike in a socialist system grows stronger as that society deviates from the classical ideals of the socialist model. For a more detailed analysis of this theory, see Hanslowe & Acierno, *supra*, 67 Cornell L.Rev. at pages 1072-1073.

This court's history provides numerous examples of this principle. In *Li v. Yellow Cab Co., supra,* 13 Cal.3d at page 812, when this court first adopted a rule of comparative negligence, we expressly rejected the contention that any change in the law of contributory negligence was exclusively a matter for the Legislature, and overturned more than a century of precedent. In *Rodriguez v. Bethlehem Steel Corp., supra,* 12 Cal.3d 382, we directly repudiated the assertion that recognition of a spousal action for loss of consortium required legislative action (see pp. 393-395) and reversed numerous prior decisions in endorsing that cause of action.

(5a) Furthermore, "[w]hen the law governing a subject has been shaped and guided by judicial decision, legislative inaction does not necessarily constitute a tacit endorsement of the precise stage in the evolution of the law extant at the time when the Legislature did nothing; it may signify that the Legislature is willing to entrust the further evolution of legal doctrine to judicial development." (*People v. Drew* (1978) 22 Cal.3d 333, 347, fn. 11 [149 Cal.Rptr. 275, 583 P.2d 1318].)

(6a) For the reasons stated above, we conclude that the common law prohibition against public sector strikes should not be recognized in this state. Consequently, strikes by public sector employees in this state as such are neither illegal nor tortious under California common law. We must immediately caution, however, that the right of public employees to strike is by no means unlimited. Prudence and concern for the general public welfare require certain restrictions.

The Legislature has already prohibited strikes by firefighters under any circumstance. It may conclude that other categories of public employees perform such essential

services that a strike would invariably result in imminent danger to public health and safety, and must therefore be prohibited.[32]

While the Legislature may enact such specific restrictions, the courts must proceed on a case-by-case basis. Certain existing statutory standards may properly guide them in this task. As noted above, a number of states have granted public employees a limited right to strike, and such legislation typically prohibits strikes by a limited number of employees involved in clearly essential services. In addition, several statutes provide for injunctive relief against other types of striking public employees when the state clearly demonstrates that the continuation of such strikes will constitute an imminent threat or "clear and present danger" to public health and safety.[33] Such an approach

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[32] See, e.g., Minnesota Statutes Annoted section 179.63(11) (1981) (firefighters, peace officers, guards at correctional facilities), Oregon Revised Statutes section 243.736 (1979) (firefighters, police officers and guards at correctional or mental health institutions); Pennsylvania Statutes Annotated title 43, section 1101.1001 (guards at correctional or mental health institutions and employees necessary to the functioning of the courts). For a further discussion of these provisions, see Hanslowe & Acierno, *The Law and Theory of Strike by Government Employees, supra*, 67 Cornell L.Rev. 1055, 1079-1083.

See also Burton & Kinder, *supra*, 79 Yale L.J. at page 437 (advocating a presumption of illegality in strikes involving truly essential services, thereby relieving the state of the burden to demonstrate the elements necessary for an injunction).

[33] See, e.g., Alaska Statutes section 23.40.200(c) (strikes by most public employees may not be enjoined unless it can be shown that it has begun to threaten the health, safety and welfare of the public); Oregon Revised Statutes section 243.726(3)(a) (injunctive relief available when strike creates a clear and present danger or threat to the health, safety or welfare of the public); Pennsylvania Statutes Annotated title 43, section 1101.1003 (injunctive relief available when strike creates a clear and

guarantees that essential public services will not be disrupted so as to genuinely threaten public health and safety, while also preserving the basic rights of public employees.

After consideration of the various alternatives before us, we believe the following standard may properly guide courts in the resolution of future disputes in this area: strikes by public employees are not unlawful at common law unless or until it is clearly demonstrated that such a strike creates a substantial and imminent threat to the health or safety of the public. This standard allows exceptions in certain essential areas of public employment (e.g., the prohibition against firefighters and law enforcement personnel) and also requires the courts to determine on a case-by-case basis whether the public interest overrides the basic right to strike.

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present danger or threats to the health, safety or welfare of the public); Wisconsin Statutes Annotated section 111.70(7m)(b) (injunctive relief available if strike poses an imminent threat to the public health or safety). See also *School District for City of Holland v. Holland Educ. Ass'n* (1968) 348 Mich. 314 [157 N.W.2d 206, 210] (Mich. Supreme Ct., in teachers strike cases, declaring state's policy is not "to issue injunctions in labor disputes absent a showing of violence, irreparable injury, or breach of the peace"); *Timberlane Reg. Sch. Dist. v. Timberlane Reg. Ed. Ass'n* (1974) 114 N.H. 245 [317 A.2d 555, 559] (N.H. Supreme Ct. refused to rule on the legality of teachers' strikes but stated that in determining whether to issue a strike injunction, a court should consider "whether the public health, safety and welfare will be substantially harmed if the strike is allowed to continue."). The Federal Labor Management Relations Act of 1947 [29 U.S.C. §§ 141-187], follows a similar approach with respect to private sector strikes. It empowers the President to direct the Attorney General to enjoin a threatened or actual strike if it affects an industry involved in interstate commerce and if permitted to occur or continue would imperil the national health or safety. (29 U.S.C. §§ 176-180.)

Although we recognize that this balancing process may impose an additional burden on the judiciary, it is neither a novel nor unmanageable task.[34] Indeed, an examination of the strike in the instant case affords a good example of how this new standard should be applied. The 11-day strike did not involve public employees, such as firefighters or law enforcement personnel, whose absence from their duties would clearly endanger the public health and safety.

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[34] Legislation in several states already requires the courts to make this precise determination. (See, e.g., the relevant statutory provisions in Alaska, Ore., Pa. and Wis.) For just one example, under the Pennsylvania Public Employee Relations Act, public employees are not prohibited from striking after they have submitted to mediation and fact finding, unless or until such a strike creates a clear and present danger or threat to the health, safety and welfare of the public. (Pa. Stat. Ann., tit. 43, § 1101.1003.) In such cases, the employer may petition for equitable relief, including injunctions, and is entitled to relief if the court finds that the strike creates the danger or threat. (*Id.*) The Pennsylvania courts have applied this standard to several classes of public employees. (See, e.g., *Bethel Park Sch. v. Bethel Park Fed. of Tchrs. 1607 Am. Fed'n of Teachers* (1980) 54 P. Commw. 49, 52 [420 A.2d 18] (teacher's strike constituted a clear and present danger to the public's health, safety and welfare and school district entitled to back-to-work order in view of potential losses of state subsidies, instructional days vocational job, higher education opportunities, counseling, social and health services, extracurricular enrichment programs and employees' work opportunities and wages); *Bristol Township Education Ass'n v. School District* (1974) 14 Pa. Commw. 463, 468-470 [322 A.2d 767] (school district entitled to injunction against teacher's strike under similar circumstances); *Highland Sewer and Water Auth. v. Local Union 459, I.B.E.W.* (1973) 67 Pa. D. & C.2d 564, 565-567 (sewer and water authority not entitled to injunction forcing striking employees back to work since there was no clear and present danger in view of the fact that the services provided by the authority could still be performed during the strike, apparently by supervisors, with relatively little inconvenience).

Moreover, there was no showing by the District that the health and safety of the public was at any time imminently threatened. That is not to say that had the strike continued indefinitely, or had the availability of replacement personnel been insufficient to maintain a reasonable sanitation system, there could not have been at some point a clear showing of a substantial threat to the public health and welfare.[35] However, such was not the case here, and the legality of the strike would have been upheld under our newly adopted standard.[36]

Defendant union has also urged this court to find that a per se prohibition of all public employee strikes violates the California Constitution's guarantees of freedom of associa-

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[35] Had such a showing been made, the trial court would then have had the authority to issue an injunction and declare the strike illegal. In cases involving sanitation strikes, it is often the *length* of the strike which will ultimately require issuance of an injunction. (See, e.g., *Highland Sewer and Water Auth. v. Local Union 459, I.B.E.W., supra,* 67 Pa. D & C.2d 564, 565-567.) In addition, if particular jobs performed by striking sanitation or other public employees require unique skills and training, it is conceivable that a public agency might be unable to find adequate replacements. In the instant matter, however, replacement personnel adequately maintained needed sanitation services without any significant threat of harm to the public. Further, the District's allegations of vandalism by the strikers (see fn. 4, *ante*), while perhaps citing individual illegal acts, were by no means enough to render the entire strike illegal or even a substantial public threat.

[36] The trial court in this matter had no reason to make a finding regarding the threat to public health and safety posed by the strike. The court merely relied on prior Court of Appeal opinions, which had held that public employee strikes were per se illegal in the absence of a specific statutory grant. In the future, trial courts will clearly be required to make such a finding. In these cases, the scope of appellate review will ordinarily be limited to determining whether reasonable grounds existed for the trial court's decision.

tion, free speech, and equal protection. The [illegible] not contend that such a constitutional infringement is present when a court exercises its equitable authority to enjoin a strike based on a showing that the strike represents a substantial and imminent danger to the public health or safety. Instead, the union argues that in the absence of such a showing, per se prohibition is constitutionally unsupportable.

(7a) The right to form and be represented by unions is a fundamental right of American workers that has been extended to public employees through constitutional adjudication[37] as well as by statute; in this case, it is

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[37] In upholding the National Labor Relations Act against constitutional attack, the United States Supreme Court recognized that the right of employees to organize for the purpose of collective bargaining is fundamental. (*Labor Board v. Jones & Laughlin* (1937) 301 U.S. 1, 33 [81 L.Ed. 893, 909, 57 S.Ct. 615, 108 A.L.R. 1352].)

It is also axiomatic that employees form and join labor organizations to protect their interests in labor disputes, and the United States Supreme Court has long recognized that "[i]n the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution. [Citations.]" (*Thornhill v. Alabama* (1940) 310 U.S. 88, 102 [84 L.Ed. 1093, 1102, 60 S.Ct. 736].) In addition, whenever a labor organization undertakes a concerted activity, its members exercise their right to assemble, and organizational activity has been held to be a lawful exercise of that right. (*Thomas v. Collins* (1945) 323 U.S. 516 [89 L.Ed. 430, 65 S.Ct. 315].)

The freedoms of speech and assembly are applicable to the states through the Fourteenth Amendment (*Hague v. C.I.O.* (1939) 307 U.S. 496 [83 L.Ed. 1493, 59 S.Ct. 954]), and may be exercised in an economic context. As explained by the United States Supreme Court in *N.A.A.C.P. v. Alabama:* "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly. [Citations.] It is beyond debate that freedom to engage in association for

specifically mandated by the provisions of the MMBA itself. **(8a)** In addition, " '[i]t is now settled law that workmen may lawfully combine to exert various forms of economic pressure upon an employer, provided the object sought to be accomplished thereby has a reasonable relation to the betterment of labor conditions, and they act peaceably and honestly. (Citations) This right is guaranteed by the federal Constitution as an incident of freedom of speech, press and assemblage, (citations) and it is not dependent upon the existence of a labor controversy between the employer and his employee.' " (*In re Blaney* (1947) 30 Cal.2d 643, 648 [184 P.2d 892], quoting *Steiner v. Long Beach Local No. 128* (1942) 19 Cal.2d 676, 682 [123 P.2d 20].)

As the union contends, however, the right to unionize means little unless it is accorded some degree of protection regarding its principal aim—effective collective bargaining. For such bargaining to be meaningful, employee groups must maintain the ability to apply pressure or at least threaten its application. A creditable right to strike is one means of doing so. As yet, however, the right to strike has not been accorded full constitutional protection, the prevailing view being that "[t]he right to strike, because of its more serious impact upon the public interest, is more vulnerable to regulation than the right to organize and

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the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech. [Citations.] Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." (*N.A.A.C.P. v. Alabama, supra*, 357 U.S. 449, 460 [2 L.Ed.2d 1488, 1498, 78 S.Ct. 1163].)

select representatives for lawful purposes of collective bargaining which this Court has characterized as a 'fundamental right. . . . ' " (*Auto. Workers v. Wis. Board* (1949) 336 U.S. 245, 259 [93 L.Ed. 651, 666, 69 S.Ct. 516].)

Further, the federal ban on public employee strikes has been specifically upheld as constitutionally permissible. (See *United Federation of Postal Clerks v. Blount, supra,* 325 F.Supp. 879, 884; affd. (1971) 404 U.S. 802 [30 L.Ed.2d 38, 92 S.Ct. 80].) In the absence of any explicit constitutional protection of the right to strike, the *Blount* court reasoned that the law prohibiting only public employees from striking need only have a rational basis to avoid offending constitutional guarantees. The court then easily found that the common law policy justifications (discussed in detail above) did indeed provide a rational basis for the per se prohibition. (See, *United Federation of Postal Clerks v. Blount, supra,* at p. 883.)

Thoughtful judges and commentators, however, have questioned the wisdom of upholding a per se prohibition of public employee strikes. They have persuasively argued that because the right to strike is so inextricably intertwined with the recognized fundamental right to organize and collectively bargain, some degree of constitutional protection should be extended to the act of striking in both the public and private sectors.

As Judge J. Skelly Wright declared in his concurrence in *United Federation of Postal Clerks v. Blount, supra,* "[i]f the inherent purpose of a labor organization is to bring the workers' interests to bear on management, the right to strike is, historically and practically, an important means of effectuating that purpose. A union that never strikes, or which can make no credible threat to strike, may wither away in ineffectiveness. That fact is not irrelevant to the

constitutional calculations. Indeed, in several decisions, the Supreme Court has held that the First Amendment right of association is at least concerned with essential organizational activities which give the particular association life and promote its fundamental purposes. . . . [Citations.] I do not suggest that the right to strike is co-equal with the right to form labor organizations. . . . But I do believe that the right to strike is, at least, within constitutional concern and should not be discriminatorily abridged without substantial or 'compelling' justification." (325 F.Supp. 879, 885.)

Chief Justice Roberts of the Rhode Island Supreme Court offered similar sentiments in a case involving a teachers' strike in that state: "Obviously, the right to strike is essential to the viability of a labor union, and a union which can make no credible threat of strike cannot survive the pressures in the present-day industrial world. If the right to strike is fundamental to the existence of a labor union, that right must be subsumed in the right to organize and bargain collectively. . . . The collective bargaining process, if it does not include a constitutionally protected right to strike, would be little more than an exercise in sterile ritualism. . . . I cannot agree that every strike by public employees necessarily threatens the public welfare and governmental paralysis. . . . The fact is that in many instances strikes by private employees pose the far more serious threat to the public interest than would many of those engaged in by public employees. . . . In short, it appears to me that to deny all public employees the right to strike because they are employed in the public sector would be arbitrary and unreasonable." (*School Committee v. Westerly Teachers Ass'n* (1973) Ill R.I. 96 [299 A.2d 441, 447-449], dis. opn.)

We are not persuaded that the personal freedoms guaranteed by the United States and California Constitutions confer an *absolute right* to strike,[38] but the arguments above may merit consideration at some future date. If the right to strike is afforded some constitutional protection as derivative of the fundamental right of freedom of association, then this right cannot be abridged absent a substantial or compelling justification.

(9a) As this court stated in *Vogel v. County of Los Angeles* (1967) 68 Cal.2d 18, 22 [64 Cal.Rptr. 409, 434 P.2d 961], which invalidated a loyalty oath requirement for public employees in this state, "even where a compelling state purpose is present, restrictions on the cherished freedom of association protected by the First Amendment and made applicable to the states by the Fourteenth Amendment must be drawn with narrow specificity. First Amendment freedoms are delicate and vulnerable and must be protected wherever possible. When government seeks to limit those freedoms on the basis of legitimate and substantial governmental purposes . . . those purposes cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. Precision of regulation is required so that the exercise of our most precious freedoms will not be unduly curtailed except to the extent necessitated by the legitimate governmental objective. (*Keyishian v. Board of*

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[38] As stated in the United States Supreme Court in *Dorchy v. Kansas:* "Neither the common law nor the Fourteenth Amendment confers the absolute right to strike." (*Dorchy v. Kansas* (1926) 272 U.S. 306, 311 [71 L.Ed. 248, 269, 47 S.Ct. 86].) Similarly, we do not find that the comparable personal freedoms guaranteed by the California Constitution confer an absolute right to strike. (See, e.g., *In re Porterfield* (1946) 28 Cal.2d 91, 114 [168 P.2d 706, 167 A.L.R. 675].)

Regents, supra, 385 U.S. 589, 602-603; *Elfbrandt v. Russell,* 384 U.S. 11, 15, *et seq.; N.A.A.C.P. v. Button,* 371 U.S. 415, 432-433; *Shelton v. Tucker,* 364 U.S. 479, 488; *Bagley v. Washington Township Hospital Dist., supra,* 65 Cal.2d 499, 506-509; *Fort v. Civil Service Com., supra,* 61 Cal.2d 331, 337-338.)"

(3b) As discussed at length above, the traditional justifications espoused in favor of a per se prohibition cannot withstand a significant degree of judicial scrutiny. Indeed, since not all public employee services are essential and many private employees perform services more vital to the public health and safety than do their counterparts in the public sector, the simplistic public/private dichotomy does not constitute a "compelling" justification for a per se prohibition of public employee strikes. Thus the constitutional arguments of defendant union and several amici cannot easily be dismissed, particularly since we will retain the limitation that public strikes may be prohibited when they threaten the public health or safety.[39]

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[39] Contrary to the characterization of our dissenting colleague, we neither applaud nor disapprove of strikes by public employees as a matter of social policy, for in the present state of the law that is not our function. The old rule in this state, to the effect that strikes by public employees are unlawful, rested expressly upon the premise that wages and conditions of employment for public employees may only be set by unilateral action of the public employer, and that collective bargaining for such employees in itself was contrary to public policy. *It is the Legislature which has removed the underpinnings from the old rule, by sanctioning a system of collective bargaining for local government employees.* At the same time, the Legislature has maintained a stony silence regarding the status of public employee strikes under the new statutory scheme. To the extent that we examine alternative justifications which have been asserted in support of a ban on such strikes, we do so only to determine whether there are any such

Since we have already concluded that the traditional per se prohibition against public employee strikes can no longer be upheld on common law grounds, we do not find it necessary to reach the issue in constitutional terms. Although we are not inclined to hold that the right to strike rises to the magnitude of a fundamental right, it does appear that associational rights are implicated to a substantial degree. As such, the close connection between

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justifications which are so compelling as to require acceptance by the courts even in the absence of legislative action. We find an affirmative answer only as regards those strikes which imperil public health or safety. As to other strikes, we conclude that the policy questions involved are highly debatable, and best left to the legislative branch in the first instance.

We find nothing in the dissenting opinion which detracts from this logic. The "cogent analysis" upon which the dissent relies for "the various rationales underlying the 'no strike' rule" (*post*, p. 610) refers nakedly to "differences in the employment relationship" between public and private sectors, and to "the preservation of a system of government in the ambit of public employment and the proscription of practices not compatible with the public employer-employee relationship." (*Id.*, at p. 611.) What the significant differences are which require a different rule, or why strikes are incompatible with the employer-employee relationship in the public sector, we are not told. Surely judicial intervention in so complex an arena requires greater justification than that.

The dissent decries also what it perceives to be the ambiguity in our rule prohibiting strikes which threaten public safety or health, and states a preference for those statutes which clearly define classes of employees who may or may not strike. The formulation we have adopted, however, is in accord with the rule in several states (*ante*, p. 585), and the dissent points to no evidence that such a rule is incapable of effective judicial administration. On the contrary, such a rule, which depends upon an assessment of public detriment from a particular strike, is entirely in accord with the traditional role of courts in equity. If the Legislature wishes to adopt a different rule, of course it may do so.

striking and other constitutionally protected activity adds further weight to our rejection of the traditional common law rationales underlying the per se prohibition. (Cf. *Environmental Planning & Information Council v. Superior Court* (1984) 36 Cal.3d 188, 195 [203 Cal.Rptr. 127, 680 P.2d 1086].)

(6b) We conclude that it is not unlawful for public employees to engage in a concerted work stoppage for the purpose of improving their wages or conditions of employment, unless it has been determined that the work stoppage poses an imminent threat to public health or safety. Since the trial court's judgment for damage in this case was predicated upon an erroneous determination that defendants' strike was unlawful, the judgment for damages cannot be sustained.[40]

The judgment is reversed.

Mosk, J., and Grodin, J., concurred.

KAUS, J.—I concur in the judgment insofar as it holds that a peaceful strike by public employees does not give rise to a tort action for damages against the union. I am aware of nothing in the Meyers-Milias-Brown Act which suggests that the Legislature intended that common law tort remedies should be applied in this context, and without such legislative endorsement I believe it is improper to import tort remedies that were devised for different situations into this sensitive labor relations arena. As this court noted in

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[40] The trial court relied upon *Pasadena Unified Sch. Dist. v. Pasadena Federation of Teachers* (1977) 72 Cal.App.3d 100 [140 Cal.Rptr. 41], which held that the conduct of an illegal strike was a tort for which damages may be recovered. Since we have held that the strike in this case was not illegal, we need not consider the correctness of that decision.

City and County of San Francisco v. Cooper (1975) 13 Cal.3d 898, 917 [120 Cal.Rptr. 707, 534 P.2d 403]: "The question as to what sanctions should appropriately be imposed on public employees who engage in illegal strike activity is a complex one which, in itself, raises significant issues of public policy. In the past, several states have attempted to deter public employee strikes by imposing mandatory draconian statutory sanctions on striking employees; experience has all too frequently demonstrated, however, that such harsh, automatic sanctions do not prevent strikes but instead are counterproductive, exacerbating employer-employee friction and prolonging work stoppages." In the absence of a determination by the Legislature that a tort action, resulting in a money damage award determined by a jury many years after the strike, is the appropriate method for dealing with public employee strikes, I do not believe the judiciary should, on its own, embrace this "solution" to the problem. (See, e.g., *Lamphere Sch. v. Lamphere Fed. of Teachers* (1977) 400 Mich. 104 [252 N.W.2d 818, 827-832, 84 A.L.R.3d 314]; *City of Fairmont v. Retail, Wholesale, etc.* (W.Va. 1980) 283 S.E.2d 589, 592-595; contra *State v. Kansas City Firefighting Local 42* (Mo.App. 1984) 672 S.W.2d 99, 107-116.) I would therefore disapprove the contrary holding in the *Pasadena Unified Sch. Dist. v. Pasadena Federation of Teachers* (1977) 72 Cal.App.3d 100, 111-114 [140 Cal.Rptr. 41].

In concluding that a common law tort action does not lie in these circumstances, it is not necessary to determine whether such a strike is "legal" or "illegal" in an abstract sense, or whether, and under what circumstances, such a strike could properly be enjoined. The question of injunctive relief presents significantly different considerations than the propriety of a tort action, and it is not before

us in this case. We should await the facts of a concrete dispute before we attempt to resolve it.

Finally, I believe it is equally unwise to venture an opinion on potential constitutional challenges to future legislative action in this field. In my view, we should—if anything—be encouraging the Legislature to attempt to deal with the difficult public policy questions in this area, not frightening it away with premature warnings of possible constitutional minefields.

Reynoso, J., concurred

BIRD, C.J., Concurring.-**(1b), (2b), (3c), (4b), (5b), (6c), (7b), (8b), (9b)** I write separately because I believe it is only fair to give the Legislature some guidance in an area filled with constitutional problems. To prompt the Legislature to enter this field without such guidance[1] not only invites error but encourages it. Such a practice is not only disingenuous, it is disrespectful to the litigants and knowingly misleads the public.

Today's decision brings the law of public employee strikes into the 20th century and makes the common law contemporary. As the court has explained, the flat prohibition against such strikes was grounded in outmoded notions of sovereignty and unreasoned fears of free labor organization.

It is appropriate that today's affirmation of the right to strike should come so soon after the tragic events surrounding the strike of Solidarity, the Polish labor union. The Solidarity strikers proclaimed that the rights to organize collectively and to strike for dignity and better treatment on the job were fundamental human freedoms. When the Polish government declared martial law and supressed the union in December 1981, Americans especially mourned the loss of these basic liberties.

The public reaction to the Solidarity strike revealed the strength of the American people's belief that the right to strike is an essential feature of a free society. In an economy increasingly dominated by large-scale business and govern-

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[1] See concurring opinions of Grodin, J. and Kaus, J. See also *In re Misener* (1985) *ante*, page 543 [___ Cal.Rptr. ___, ___ P.2d ___] and its antecedent, *People v. Collie* (1981) 30 Cal.3d 43 [177 Cal.Rptr. 458, 634 P.2d 534, 23 A.L.R.4th 776], which graphically illustrate this very problem.

mental organizations, the right of employees to withhold their labor as a group is an essential protection against abuses of employer power. (See, e.g., *Amer. Foundries v. Tri-City Council* (1921) 257 U.S. 184, 209 [66 L.Ed. 189, 199, 42 S.Ct. 72, 27 A.L.R. 360].) Hence, it is widely presumed that "we have the right as free men to refuse to work for just grievances: the strike is an unalienable weapon of any citizen." (Reagan & Hubler, Where's the Rest of Me? (1965) p. 138.)

The majority opinion suggests that the right to strike may have constitutional dimensions. (Maj. opn., *ante*, at pp. 589-591.) I write separately to elaborate on this point. Although the right to strike has a long history in American jurisprudence, its textual and theoretical foundations have eluded a comprehensive analysis. Instead, the courts have danced a minuet around the issue. The time has come to make explicit that which has so frequently been presumed. If the right to strike does indeed differentiate this country from those that are not free, then it must be given substance and enforced.

The constitutional right to strike rests on a number of bedrock principles: (1) the basic personal liberty to pursue happiness and economic security through productive labor (U.S. Const., 5th and 14th Amends.; Cal. Const., art.I, §§ 1, 7, subd. (a)); (2) the absolute prohibition against involuntary servitude (U S. Const., 13th Amend.; Cal. Const., art. I, § 6; and (3) the fundamental freedoms of association and expression (U.S. Const., 1st Amend.; Cal. Const., art. I, §§ 2, subd. (a), 3).

It is beyond dispute that the individual's freedom to withhold personal service is basic to the constitutional concept of "liberty." Without this freedom, working people would be at the total mercy of their employers, unable

either to bargain effectively or to extricate themselves from an intolerable situation. Such a condition would make a mockery of the fundamental right to pursue life, liberty and happiness by engaging in the common occupations of the community. (See *Sail'er Inn, Inc. v. Kirby* (1971) 5 Cal.3d 1, 17 [95 Cal.Rptr. 329, 485 P.2d 529, 46 A.L.R.3d 351]; see also *Nash v City of Santa Monica* (1984) 37 Cal.3d 97, 110 [207 Cal.Rptr. 285, 688 P.2d 894] (conc. and dis. opn. of Bird, C.J.) [right to withhold personal service as a landlord is constitutionally protected liberty interest]; *id.*, at p. 114 (dis. opn. of Mosk, J.) [same]; cf. U.S. Const., 13th Amend. [prohibiting involuntary servitude]; Cal. Const., art. I, § 6 [same].)

Nevertheless, in the early years of this country, the concerted withholding of labor was outlawed under the doctrine of "criminal conspiracy." (See Frankfurter & Greene, The Labor Injunction (1930) pp. 2-3, and cases cited.) Although workers—with the exception of chattel slaves—enjoyed the right to leave employment as individuals, they were prohibited from doing so as a group. (*Ibid.*) Apparently, the courts assumed that working people could adequately protect their liberty interests by exercising their personal right to terminate employment and compete as individuals in the labor market.

As Archibald Cox has written, "[s]ome of the major problems of constitutional law . . . arise from the necessity of shaping guarantees born of an individualistic society to the conditions resulting from the solidarity of organized groups." (Cox, *Strikes, Picketing and the Constitution* (1951) 4 Vand.L.Rev.574, 579 [hereafter Cox].) The recognition of group rights for laborers trailed behind the

legal acceptance of the modern business corporation, a group form of property ownership.[2]

The right to strike was initially regarded as labor's counterpart to the massive economic power concentrated in the corporation. With the rise of monolithic business enterprises, it could no longer be maintained that employees' freedom to compete in the labor market as individuals would be sufficient to protect their liberty interests. In a famous dissenting opinion, Justice Oliver Wendell Holmes observed: "One of the eternal conflicts out of which life is made up is that between the effort of every man to get the most he can for his services, and that of society, disguised under the name of capital, to get his services for the least possible return. Combination on the one side is patent and powerful. Combination on the other is the necessary and desirable counterpart, if the battle is to be carried on in a fair and equal way." (*Vegelahn v. Guntner* (Mass. 1896) 44 N.E. 1077, 1081 (dis. opn. of Holmes, J.).)

In Holmes's view, the right to strike was integral to this latter combination: "If it be true that workingmen may combine with a view, among other things, to getting as much as they can for their labor, just as capital may combine with a view to getting the greatest possible return, it must be true that, when combined, they have the same

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[2] The modern form of corporate organization, which grants the corporate management broad powers to act on behalf of shareholders, emerged in the latter part of the 19th century. (See generally, Berle & Means, The Modern Corporation and Private Property (1939) pp. 127-152.) During the 1890's, the United States Supreme Court ruled that corporations possess constitutional rights. (See, e.g., *Chicago, &c. Railway Co. v Minnesota* (1890) 134 U.S. 418 [33 L.Ed. 970, 10 S.Ct. 462] ["liberty"]; *Smyth v. Ames* (1898) 169 U.S. 466 [42 L.Ed. 819, 18 S.Ct. 418] ["property"].)

liberty that combined capital has, to support their interests by argument, persuasion, and the bestowal or refusal of those advantages which they otherwise lawfully control." (*Vegelahn v. Guntner, supra,* 44 N.E. at p 1081.)

This theoretical foundation was later adopted by the United States Supreme Court. In an opinion by Chief Justice Taft, the court declared: "[Unions] were organized out of the necessities of the situation. A single employee was helpless in dealing with an employer. He was dependent ordinarily on his daily wage for the maintenance of himself and family. If the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and to resist arbitrary and unfair treatment. Union was essential to give laborers opportunity to deal on equality with their employer. They united to exert influence upon him and leave him in a body, in order, by this inconvenience, to induce him to make better terms with them. They were withholding their labor of economic value to make him pay what they thought it was worth. The right to combine for such a lawful purpose has, in many years, not been denied by any court." (*Amer. Foundries v. Tri-City Council, supra,* 257 U.S. at p. 209 [66 L.Ed. at p. 199].)

A few years later the high court, with Chief Justice Hughes writing, asserted that the right of employees to engage in "collective action" was "not to be disputed." (*Texas & N.O.R. Co. v. Ry. Clerks* (1930) 281 U.S. 548, 570 [74 L.Ed. 1034, 1046, 50 S.Ct. 427].) Finally, the court proclaimed that employees' rights of self-organization were "fundamental" in nature. (*Labor Board v. Jones & Laughlin (1937) 301 U.S. 1, 33* [*81 L.Ed. 893, 909, 57 S.Ct. 615, 108 A.L.R. 1352*].)

Though these forceful statements suggest that the Supreme Court included the right to strike among those liberties protected by the Constitution, that proposition was never squarely asserted. Instead, a federal district court was the first to define the right in unambiguous terms: "The right to peaceably strike or to participate in one, to work or refuse to work, and to choose the terms and conditions under which one will work, like the right to make a speech, are fundamental human liberties which the state may not condition or abridge in the absence of grave and immediate danger to the community." (*Stapleton v. Mitchell* (D.Kan. 1945) 60 F.Supp. 51, 61, app. dism. by stip., 326 U.S. 690 [90 L.Ed. 406, 66 S.Ct. 172] [invalidating a Kansas law that prohibited various labor activities, including strikes]; see also *Alabama State Federation of Labor v. McAdory* (1944) 246 Ala. 1 [18 So.2d 810, 827-828] [striking down Alabama law that prohibited all strikes not endorsed by a majority of the struck employer's employees].)

The status of the right to strike as a constitutionally protected "liberty" arises not only from the considerations of fairness set forth by Justice Holmes and Chief Justices Taft and Hughes, but also from the inherent nature of work. In the words of Justice Felix Frankfurter, "[t]he coming of the machine age tended to despoil human personality. It turned men and women into 'hands.' The industrial history of the early Nineteenth Century demonstrated the helplessness of the individual employee to achieve human dignity in a society so largely affected by technological advances. Hence the trade union made itself increasingly felt, not only as an indispensable weapon of self-defense on the part of workers but as an aid to the well-being of a society in which work is an expression of life and not merely the means of earning subsistence." (*A.F. of L. v. American Sash Co. (1949) 335 U.S. 538, 542-543* [*93 L.Ed.*

222, 225, 69 S.Ct. 258, 6 A.L.R.2d 481] (conc. opn. of Frankfurter, J.).)

Perhaps in response to this concern, some courts—including a California Court of Appeal—adopted an absolutist position, recognizing no distinction whatever between the rights of employees to quit work as individuals or in a group: "It is the right of every man to engage to work for or to deal with, or to refuse to work for or to deal with, any man or class of men as he sees fit, whatever his motive or whatever the resulting injury, without being held in any way accountable therefor. [Citations.] These rights may be exercised in association with others so long as they have no unlawful object in view." (*Overland P. Co. v. Union L. Co.* (1922) 57 Cal.App. 366 370-371 [207 P. 412]; see also Tobriner, *The Organizational Picket Line: Lawful Economic Pressure* (1951) 3 Stan.L.Rev. 423, 426, fn. 16 [in spite of four separate opinions, the decision of this court in *Parkinson Co. v. Bldg. Trades Council* (1908) 154 Cal. 581 [98 P. 1027] rests on the absolute right of a labor union to strike].)

It has been argued that constitutional protection for strike activities would intrude on the legislative function. The courts have exercised restraint in applying the constitutional guarantee of "liberty" to legislative determinations of economic policy. This restraint reflects the fear that the diffuse concept of liberty could be employed as a device for the imposition of judicial policy judgments. (See *Lochner v. New York* (1905) 198 U.S. 45, 74-76 [49 L.Ed. 937, 948-949, 25 S.Ct. 539] (dis. opn. of Holmes, J.).)

Nevertheless, the mere fact that an enactment covers economic matters does not insulate it from scrutiny where an important constitutional guarantee is implicated. The Constitution expressly protects certain rights of "property."

(U.S. Const., 5th and 14th Amends.; Cal. Const., art. I §§ 1, 7, subd.(a).) As Professor Cox has observed, "[a] constitution which assures the owner of property an opportunity to obtain a reasonable return on his capital must recognize the worker's interest in the conditions under which he labors and the price he receives for his work." (Cox, *supra*, 4 Vand.L.Rev.at p. 580.)

Furthermore, recognition of the right to strike does not require an unconstrained judicial construction of the term "liberty." The courts can find constitutional guidance in the close nexus between the right to strike and a specific constitutional provision: the ban on involuntary servitude. (U.S. Const., 13th Amend.; Cal. Const., art. I, § 6.) Though this provision might not by itself guarantee the right to strike, it does provide clear support for the proposition that the strike is an exercise of constitutionally protected liberty.

Justice Brandeis once declared, in a case involving a peaceful, concerted refusal to work: "If, on the undisputed facts of this case, refusal to work can be enjoined, Congress [has] created . . . an instrument for imposing restraints upon labor which reminds of involuntary servitude." (*Bedford Co. v. Stone Cutters Assn.* (1927) 274 U.S. 37, 65 [71 L.Ed. 916, 928, 47 S.Ct. 522, 54 A.L.R. 791] (dis. opn. of Brandeis, J., joined by Holmes, J.); see also *France Packing Co. v. Dailey* (3d Cir. 1948) 166 F.2d 751, 758 (dis. opn. of O'Connell, J.) [construing War Labor Disputes Act to permit voluntary strikes in view of the constitutional ban on involuntary servitude].) Some courts have invalidated antistrike restrictions as inconsistent with the ban on involuntary servitude. (See e.g., *Henderson v. Coleman* (1942) 150 Fla. 185 [7 So.2d 117, 121]; *United States v.*

Petrillo (N.D.Ill. 1946) 68 F.Supp. 845, 849, revd. (1947) 332 U.S. 1 [91 L.Ed. 1877, 67 S.Ct. 1538].)[3]

The close connection between the right to strike and the prohibition against involuntary servitude derives from the purposes of the 13th Amendment. That amendment guarantees the freedom to terminate employment not for its own sake, but in order to "prohibit[ ] that control by which the personal service of one man is disposed of or coerced for another's benefit which is the essence of involuntary servitude." (*Bailey v. Alabama* (1911) 219 U.S. 219, 241 [55 L.Ed. 191, 201, 31 S.Ct. 145].)

Accordingly, the amendment is concerned not merely with the formal right to quit, but also with the *practical ability of working people to protect their interests in the workplace*: "[I]n general the defense against oppressive hours, pay, working conditions, or treatment is the right to change employers. When the master can compel and the laborer cannot escape the obligation to go on, there is no power below to redress and no incentive above to relieve a harsh overlordship or unwholesome conditions of work." (*Pollock v. Williams* (1944) 322 U.S. 4, 18 [88 L.Ed. 1095, 1104, 64 S.Ct. 792]; see generally, Cox, *supra*, 4 Vand.L.Rev. at p. 576.)

As courts and commentators universally acknowledge, the group right to strike has replaced the individual right to "change employers" as the principal defense of working people against oppressive conditions. The rise of multinational corporations and large-scale government has

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[3] In *Petrillo*, the Supreme Court reversed the district court's holding as to involuntary servitude solely on the ground that the restriction at issue did not—on its face—prohibit strike activities. (*United States v. Petrillo, supra*, 332 U.S. at pp. 12-13 [91 L.Ed. at pp. 1885-1886].)

produced a corresponding decrease in the practical significance of the right to quit for the individual. To withdraw the right to strike is to deprive the worker of his or her only effective bargaining power. (See maj. opn., *ante*, at pp. 589-590; see also Burton & Krider, *The Role and Consequences of Strikes by Public Employees* (1970) 79 Yale L.J. 418, 419-420, and sources cited.) This undeniable fact is reflected in the intensity of the public reaction to the suppression of the Solidarity strike.

Over 30 years ago, the question of whether the 13th Amendment protects the right to strike was termed "momentous" by two justices of the United States Supreme Court. (*A.F. of L. v. American Sash Co., supra*, 335 U.S. at p. 559 [93 L.Ed. at p. 234] (conc. opn. of Rutledge, J., joined by Murphy, J.) [expressly reserving judgment on the question].) Yet, that court has never squarely addressed the issue.[4]

The notion of a 13th Amendment right to strike has been rejected by some lower federal courts and state courts.

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[4] The court came closest to confronting the issue in *Auto. Workers v. Wis. Board* (1949) 336 U.S. 245 [93 L.Ed. 651, 69 S.Ct. 516]. In that case, a union had conducted a series of "union meetings" at irregular times during work hours. The Wisconsin Employment Relations Board issued an order prohibiting any "concerted effort to interfere with production of the complainant *except by leaving the premises in an orderly manner for the purpose of going on strike.*" (*Id.*, at p. 250 [93 L.Ed. at p. 661], italics added.) The court sustained the order against a 13th Amendment challenge. Whatever the merits of this conclusion (see *id.*, at p. 269 [93 L.Ed. at p. 671] (dis. opn. of Murphy, J.) [the majority find the union's tactic objectionable only because it is effective), it is clear that the court did not decide the general question of whether the 13th Amendment guaranteed the right to strike: "Our only question is . . . whether it is beyond the power of the State to prohibit the particular course of conduct described." (*Id.*, at p. 251 [93 L.Ed. at p. 661].)

These courts have relied on two lines of reasoning. First, some have suggested that the prohibition against involuntary servitude protects only the right of employees to withhold personal services as individuals. (See, e.g., *Western Union Tel. Co. v. International B. of E. Workers* (N.D.Ill. 1924) 2 F.2d 993, 994-995, affd. (7th Cir. 1925) 6 F.2d 444 [46 A.L.R. 1538].) However, as explained above, this line of argument cannot justify the total nonprotection of strike activities in an economy dominated by large and powerful employers. (See *ante*, at p. 598-599.)

Other courts have held that the 13th Amendment does not protect a *temporary* withholding of labor. (See, e.g., *Dayton Co. v. Carpet, Linoleum and Resilient Fl. D., etc.* (1949) 229 Minn. 87 [39 N.W.2d 183, 197-198], app. dism., (1950) 339 U.S. 906 [94 L.Ed. 1334, 70 S.Ct. 570].) However, in view of the purposes of the prohibition on involuntary servitude, "can it matter whether the worker quits permanently or merely leaves the establishment until conditions are changed? In the former case he may be said to be exercising the right to sell his services to the highest bidder, leaving others to take his former job, while in the latter case he is seeking to injure the employer by cutting off the supply of labor. But this reasoning scarcely justifies a constitutional distinction, for in either case the improvement of employment conditions ultimately depends upon a withholding of labor from marginal employers until they offer more .... [T]he temporary or permanent character of the quitting seems irrelevant." (Cox, *supra*, 4 Vand.L.Rev. at pp. 576-577.)

More fundamentally, it is not suggested here that the prohibition on involuntary servitude standing alone necessarily guarantees the right to strike. That provision does, however, provide ample support for the proposition

that the right to strike must be counted among those constitutionally protected "liberties" that are essential to human freedom.

The concerted withholding of labor warrants protection not only as an exercise of personal liberty, but also as an incident of the fundamental freedoms of association and expression. (U.S. Const., 1st Amend.; Cal. Const., art. I, §§ 2, 3.) As the majority point out, the right of workers to combine and exert " 'various forms of economic pressure' " on employers is constitutionally protected. (Maj. opn., *ante*, at p. 588, quoting *In re Blaney* (1947) 30 Cal.2d 643, 647-648 [184 P.2d 892].)

Working people enjoy the constitutional right to form and join unions. (See, e.g., *Orr v. Thorpe* (5th Cir. 1970) 427 F.2d 1129, 1131; *American Federation of State, Co., & Mun. Emp. v. Woodward* (8th Cir. 1969) 406 F.2d 137, 139-140.) Without a constitutionally protected right to strike, the use of these freedoms would be "little more than an exercise in sterile ritualism." (*School Committee v. Westerly Teachers Ass'n* (1973) 111 R.I. 96 [299 A.2d 441, 448] (dis. opn. of Roberts, C.J.); see also *United Federation of Postal Clerks v. Blount* (D.D.C. 1971) 325 F.Supp. 879, 885 (conc. opn. of Wright, J.), aff'd. mem. 404 U.S. 802 [30 L.Ed.2d 38, 92 S.Ct. 80].)

Recent decisions concerning consumer boycotts provide persuasive authority for the protection of strikes under the guarantees of free association and expression.[5] Consumer boycotts were, like strikes, originally prohibited at common

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[5] A boycott is an organized refusal to deal. (See Note, *Political Boycott Activity and the First Amendment* (1978) 91 Harv.L.Rev. 659.) A strike is one form of boycott—i.e., an organized refusal by workers to provide labor.

law. (See generally, Note, *Political Boycott Activity and the First Amendment, supra,* 91 Harv.L.Rev. at pp. 676-677.)

However, in a series of cases involving consumer boycotts by civil rights advocates, the courts began to recognize that such boycotts, like strikes, provide a necessary counterweight to entrenched economic power. In 1948, Justice Roger Traynor observed that "[i]n their struggle for equality the only effective economic weapon Negroes have is the purchasing power they are able to mobilize to induce employers to open jobs to them . . .. Only a clear danger to the community would justify judicial rules that restrict the peaceful mobilization of a group's economic power to secure economic equality." (*Hughes v. Superior Court* (1948) 32 Cal.2d 850, 868 [198 P.2d 885] (dis. opn. of Traynor, J.), affd. (1950) 339 U.S. 460 [94 L.Ed. 985, 70 S.Ct. 718]; see also *Garner v. Louisiana* (1961) 368 U.S. 157, 201 [7 L.Ed.2d 207, 239, 82 S.Ct. 248] (conc. opn. of Harlan, J.) [the First and Fourteenth Amendments protect sit-ins called to protest the racial practices of private businesses].)

In *NAACP v. Claiborne Hardware Co.* (1982) 458 U.S. 886, 907-915 [73 L.Ed.2d 1215, 1232-1238, 102 S.Ct. 3409] (hereafter *Claiborne Hardware),* the United States Supreme Court held that a peaceful, politically motivated boycott constituted an exercise of the constitutional freedoms of association and expression. In that case, black citizens of Port Gibson, Mississippi, boycotted white-owned businesses to pressure those businesses and elected public officials to implement policies of racial equality. (*Id.,* at pp. 898-900 [73 L.Ed.2d at pp. 1226-1228]; *N.A.A.C.P. v. Claiborne Hardware Co.* (Miss. 1980) 393 So.2d 1290, 1295-1297.) The Mississippi Supreme Court affirmed the trial court's holding that the boycotted businesses were entitled to injunctive and monetary relief. (*Id.,* at pp. 1293,1302.)

The United States Supreme Court reversed. (*Claiborne Hardware, supra,* 458 U.S. at p. 934 [73 L.Ed.2d at p. 1249].) The court rejected the common law view that boycotts were devoid of constitutional value by virtue of their coercive nature. "Speech does not lose its protected character . . . simply because it may embarrass others or coerce them into action." (*Id.,* at p. 910 [73 L.Ed.2d at p. 1234].) On the contrary, the boycott was entitled to protection as an effective and nonviolent means of bringing about political, social, and economic change. (*Id.,* at pp. 907-915 [73 L.Ed.2d at pp. 1232-1238].) Accordingly, "[t]he right of the States to regulate economic activity could not justify a complete prohibition" against the boycott. (*Id.,* at p. 914 [73 L.Ed.2d at p. 1237].)[6]

This court has recently had occasion to apply the principles announced in *Claiborne Hardware.* In *Environtal Planning & Information Council v. Superior Court*

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[6] The court's analysis covered both the boycott itself and the expressive activities used to sustain and expand it. (*Claiborne Hardware, supra,* 458 U.S. at pp. 907-912 [73 L.Ed.2d at pp. 1232-1236].) A boycott is at once a form of association and a means of expression. The decision to boycott results from processes of assembly and debate. (See, e.g., *id.,* at p. 907 [73 L.Ed.2d at p. 1232].) Once commenced, the boycott is a form of symbolic expression. Most obviously, it forcefully communicates the participants' views to the target. Further, as a newsworthy event, the boycott provides the participants with a platform for explaining and advocating their views to the public. They pay for this platform by foregoing the benefits of trade or employment. (Compare *Citizens Against Rent Control v. Berkeley* (1981) 454 U.S. 290, 296 [70 L.Ed.2d 492, 498-499, 102 S.Ct. 434] [the contribution and expenditure of money are essential to effective advocacy since the means for communicating with the public are costly].) In short, the boycott is a nonviolent method of conveying not only the content but also the intensity of the participants' views.

(1984) 36 Cal.3d 188 [203 Cal.Rptr. 127, 680 P.2d 1086] (hereafter *Environmental Planning*), an environmental group sought to influence a newspaper's editorial policies by boycotting businesses that advertised in the newspaper. The newspaper's publisher brought suit claiming tortious interference with an economic relationship.

This court rejected the publisher's argument that only civil rights boycotts should be accorded constitutional protection: "As in *Claiborne Hardware*, . . .[the boycotters'] activities constitute a 'politically motivated boycott designed to force governmental and economic change' (458 U.S. at p. 914 [ ]), and the fact that the change which they seek bears upon environmental quality rather than racial equality, can hardly support a different result." (*Environmental Planning, supra*, 36 Cal.3d at p. 197.) Applying common law principles in light of federal and state constitutional guarantees, the court held that the environmental group was engaging in lawful activity. (*Id.*, at pp. 197-198.)

I see no principled basis for granting protection to "politically motivated" consumer boycotts while withdrawing protection from labor boycotts. In *Environmental Planning*, this court expressly reserved the question whether *Claiborne Hardware's* apparent distinction between political and labor boycotts reflects the dictates of the California Constitution. (36 Cal.3d at p. 198, fn. 9.) The prior decisions both of this court and of the United States Supreme Court indicate that labor boycotts should be entitled to full constitutional protection.

Differential treatment of political and labor activity runs afoul of the well-established principle of judicial impartiality among speakers and messages. "Of course, it is immaterial whether the beliefs sought to be advanced by

association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." (*N.A.A.C.P. v. Alabama* (1958) 357 U.S. 449, 460-461 [2 L.Ed.2d 1488, 1498-1499, 78 S.Ct. 1163], quoted by the majority, *ante*, at p. 587, fn. 37; see also *Environmental Planning, supra*, 36 Cal.3d at p. 197).

Similarly, labor unions are entitled to no less protection than civil rights organizations and environmental groups. "The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual." (*First National Bank of Boston v. Bellotti* (1978) 435 U.S. 765, 777 [55 L.Ed.2d 707, 718, 98 S.Ct. 1407].)

If these principles of judicial neutrality held sway without qualification, the political-labor distinction could be rejected without further discussion. However, as this court has recognized, "commercial" expression is accorded a lowered level of protection. (See *Environmental Planning, supra*, 36 Cal.3d at p. 197; accord *Bolger v. Youngs Drug Products Corp.* (1983) 463 U.S. 60, 64 [77 L.Ed.2d 469, 476, 103 S.Ct. 2875, 2879].)

The United States Supreme Court has defined commercial speech alternately as "speech which does 'no more than propose a commercial transaction' " (*Va. Pharmacy Bd. v. Va. Consumer Council* (1976) 425 U.S.748, 762 [48 L.Ed.2d 346, 358, 96 S.Ct. 1817]) or "expression related solely to the economic interests of the speaker and its audience" (*Central Hudson Gas & Elec. v. Public Serv. Comm'n* (1980) 447 U.S. 557, 561 [65 L.Ed.2d 341,348, 100 S.Ct. 2343]). Labor expression cannot be reduced to such narrow

concerns. It should not be relegated to the lowered protection accorded commercial expression.

Labor disputes cover a broad range of issues, many of which involve basic concerns of liberty. "A collective bargaining agreement is an effort to erect a system of industrial self-government." (*Steelworkers v. Warrior & Gulf Co.* (1960) 363 U.S. 574, 580 [4 L.Ed.2d 1409, 1416, 80 S.Ct. 1347].) For the bulk of each day, working people are subject to the codes of conduct that govern their workplaces. Those codes—whether embodied in collective bargaining agreements, employer rule books, or informal practices—govern matters ranging from race relations to permission to use the bathroom. (See generally, Shulman, *Reason, Contract, and Law in Labor Relations* (1955) 68 Harv.L.Rev. 999, 1002-1008 [hereafter Shulman]; Cox, *Reflections Upon Labor Arbitration* (1959) 72 Harv.L.Rev. 1482, 1490.) While on the job, working people feel the force of these rules more immediately and directly than those of the government.

Herein lies the link between the guarantee of personal liberty, as informed by the ban on involuntary servitude, and the freedoms of association and expression. The issues that arise in the workplace rival those addressed in the political process in their actual impact on the breadth of liberty enjoyed by working people. The strike is an essential weapon in the worker's defense against "that control by which the personal service of one man is disposed of or coerced for another's benefit . . .." (*Bailey v. Alabama, supra,* 219 U.S. at p. 241 [55 L.Ed. at p. 201]; see *ante,* at pp. 598-599. And, it is a weapon that employs the constitutionally favored methods for promoting change: peaceful association and expression. (See *ante,* at p. 602 & fn. 6.) Surely, the Constitution protects the efforts of

working people to preserve and expand their liberties by means of nonviolent—albeit outspoken and impolite—forms of association and expression. (Cf. *Claiborne Hardware, supra,* 458 U.S. at pp. 907-912 [73 L.Ed.2d at pp. 1232-1236].)

As the Polish strikers discovered, a free labor organization cannot coexist with political tyranny. The converse is no less true: "Collective bargaining is today, as Brandeis pointed out, the means of establishing industrial democracy as the essential condition of political democracy, the means of providing for the workers' lives in industry the sense of worth, of freedom, and of participation that democratic government promises them as citizens." (Shulman, *supra,* 68 Harv.L.Rev. at p. 1002.)[7]

The fact that unions and their members seek increased compensation as well as greater liberty does not lower the expression of their grievances to the level of commercial speech. In the words of Congress, "[t]he labor of a human being is not a commodity or article of commerce." (15 U.S.C. § 17.) Unlike the sale of a commodity, the sale of labor gives rise to rights of control over a person's time and activity. The employer obtains not only the product of the employee's labor, but also considerable power to dictate when and how the work will be performed. (See generally, Dept. of Health, Ed. & Welf., Work in America (1973) [hereafter HEW Report].) The amount of compensation is, in part, a tradeoff for personal subordination. This feature of wages and benefits explains why the 13th Amendment, a guarantee of personal liberty, is concerned with "the

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[7] The Constitution does not mandate collective bargaining. Whatever the particular system of labor relations, a degree of liberty in the employment relationship is essential to democracy.

defense against oppressive hours, pay [and] working conditions." (*Pollock v. Williams, supra* ,322 U.S. at p. 18 [88 L.Ed. at p. 1104].)[8]

In short, the asserted political-labor distinction provides no basis for denying to working people and unions the protection afforded civil rights activists and environmentalists. Accordingly, a restraint on the right to strike should be upheld under the California Constitution only if it serves a compelling state interest by the least restrictive means.[9]

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[8] Over a century ago, John Stuart Mill eloquently expressed a view of liberty in the employment relation: "Human nature is not a machine to be built after a model, and set to do exactly the work prescribed for it, but a tree, which requires to grow and develop itself on all sides, according to the tendency of the inward forces which make it a living thing." (Mill, On Liberty (Shields edit. 1956) p. 72.) More recently, it has been widely recognized that issues relating to authority and work content are of central importance in labor relations. (See, e.g., HEW Report; Hill, Competition and Control at Work (1982) pp. 16-44; Hirszowicz, Industrial Sociology (1982); Work in America: The Decade Ahead (Kerr & Rosow edits. 1979); Martin, Contemporary Labor Relations (1979) pp. 125-129; Tepperman, Not Servants Not Machines: Office Workers Speak Out (1976); Case Studies on the Labor Process (Zimbalist edit. 1979).) Whatever one's views on the question of personal liberty in the workplace, it is clear that debate and controversy over that issue cannot be reduced to the status of purely "commercial" speech.

[9] The notion that the United States Constitution protects the right to strike was rejected by a two-judge majority in *United Federation of Postal Clerks v. Blount, supra,* 325 F.Supp. 879, aff'd. mem. 404 U.S. 802 [30 L.Ed.2d 38, 92 S.Ct. 80] (hereafter *Blount*). However, the California Constitution possesses independent vitality. (See, e.g., *Serrano v. Priest* (1976) 18 Cal.3d 728, 764-766 [135 Cal.Rptr. 345, 557 P.2d 929].) Hence, *Blount* is not binding authority as to the state constitutional claim. Nor did the *Blount* court provide any persuasive reasoning in support of its holding.

First, the *Blount* court erroneously suggested that since the common law provided no protection for strikes, neither did the United States

Constitution. (*Blount, supra,* 325 F.Supp. at p. 882.) The court did not have the benefit of the *Claiborne Hardware* decision, which held that a consumer boycott was constitutionally protected in spite of the fact that such boycotts had been prohibited under the common law. (458 U.S. at pp. 907-915 [73 L.Ed.2d at pp. 1232-1238].) Moreover, this court today overturns the common law ban on public employee strikes in this state.

Next, the court asserted that the right to strike was fully protected for the first time by section 7 of the National Labor Relations Act (NLRA). (*Blount, supra,* 325 F.Supp. at p. 882.) However, as the Chief Justice of the Rhode Island Supreme Court has explained, the NLRA presumed that working people already possessed the right to strike: "The fact is that § 7 of that act makes no mention of the right to strike. In § 13 thereof reference is made to the right to strike as follows: 'Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.' Obviously, § 13 is a rule of construction. [Citation.] It is my opinion that the NLRA recognized the rights which labor already had and was intended to afford those rights extensive legislative protection." (*School Committee v. Westerly Teachers Ass'n, supra,* 299 A.2d at p. 447 (dis. opn. of Roberts, C.J.)

Nowhere did the *Blount* court address the concerns set forth in the present opinion.

Other federal authorities are no more persuasive. In two cases decided prior to *Claiborne Hardware, supra,* 458 U.S. 886, the Supreme Court summarily rejected First Amendment claims by labor unions. (See *NLRB v. Retail Store Employees* (1980) 447 U.S. 607, 616 [65 L.Ed.2d 377, 385-386, 100 S.Ct. 2372] [upholding restriction on peaceful consumer boycott picketing]; *Longshoremen v. Allied International, Inc.* (1982) 456 U.S. 212, 226-227 [72 L.Ed.2d 21, 32, 102 S.Ct. 1656] [upholding prohibition against longshoremen refusing to handle cargo bound to or from the Soviet Union].) However, in each case, the court provided only one paragraph of explanation, relying mainly on the "coercive" nature of boycott activities. The subsequent decision in *Claiborne Hardware* undercut this reasoning. Peaceful boycott activities were held protected in spite of their coercive aspects. (458 U.S. at p. 910 [73 L.Ed.2d at p. 1234].) Clearly, there is no principled basis for refusing to apply this approach in the labor context. (See *ante,* at

The right to strike must be guaranteed to public and private employees alike. In accepting public employment, individuals do not thereby sacrifice their constitutional rights. (See e.g., *Bagley v. Washington Township Hospital Dist.* (1966) 65 Cal.2d 499, 503-505 [55 Cal.Rptr. 401, 421 P.2d 409].) The constitutional guarantees of personal liberty, freedom of association, and freedom of expression are no less important to public workers than to other working people.

At one time, the ban on public employee strikes might have been described as a limited exception to the general right to strike. However, between 1930 and 1970, public employees increased from about 3.2 million to more than 13 million. As a percentage of the work force, public employment rose from approximately 6.5 percent to over 15 percent, with state and local workers accounting for most of the increase.[10] There would be an obvious inconsistency

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pp. 602-605; see also Pope, *The Three-Systems Ladder of First Amendment Values: Two Rungs and a Black Hole* (1984) 11 Hastings Const. L.Q. 189, 232-246; Getman, *Labor Law and Free Speech: The Curious Policy of Limited Expression* (1984) 43 Maryland L.Rev.4, 12-19; Harper, *The Consumer's Emerging Right to Boycott: NAACP v. Claiborne Hardware and Its Implications for American Labor Law* (1984) 93 Yale L.J. 409 [hereafter Harper]; Note, *Labor Picketing and Commerical Speech: Free Enterprise Values in the Doctrine of Free Speech* (1982) 91 Yale L.J. 938; Note, *Peaceful Labor Picketing and the First Amendment* (1982) 82 Colum.L.Rev. 1469.)

[10] These figures were compiled from [illegible] States Department of Commerce's Statistical Abstract of the United States, page 303, table No. 487 (1984) [hereafter Statistical Abstract]; 1 United States Department of Commerce, Bureau of the Census, Historical Statistics of the United States, Colonial Times to 1970 (1975) Series D 11-25, page 127; 2 United States Department of Commerce, Bureau of the Census, Historical Statistics of the United States, Colonial Times to 1970, *supra*, Series Y

were this court to recognize that the right to strike is essential to a free society while denying that right to a significant proportion of the working population.

It has been argued that public employee strikes lack constitutional protection since they enable public workers to exercise a disproportionate influence on the political process. In this view, the principles announced in *Claiborne Hardware* should appply only to consumer boycotts. The power to withhold patronage is said to be less dangerous than the power to withhold labor because consumer power is more widely dispersed. (See generally Harper, *supra*, 93 Yale L.J. at pp. 426-427.)

However, as the present majority opinion explains, the coercive potential of public employee strikes is sharply limited by economic and political conditions. Many government services can be foregone over substantial periods without serious harm. Others can be contracted out to private industry. Where services are financed by user fees, the users can exert effective pressure against the strikers. Last but not least, the taxpaying public in general frequently mounts effective opposition to public employee strikes. (See maj. opn., *ante*, at pp. 578-579.)

On a deeper level, the constitutional considerations behind the right to strike are, if anything, more compelling than those supporting the right to withhold patronage. Consumer boycotts, unlike strikes, do not implicate either the fundamental liberty to pursue happiness through labor or the prohibition against involuntary servitude. (See *ante*, at pp. 596-600.)

272-289, page 1100, Series Y 308-317, page 1102, Series Y 332-334, page 1104.

Furthermore, the argument of "disproportionate" political influence is untenable in view of the United States Supreme Court's treatment of monetary wealth, perhaps the most concentrated form of economic power.[11] Restrictions on political expenditures and contributions are subject to strict judicial scrutiny. (*Buckley v. Valeo* (1976) 424 U.S. 1, 15-19, 58-59, [46 L.Ed.2d 659, 685-688, 710, 96 S.Ct. 612].) Corporations as well as individuals enjoy the right to employ concentrated wealth in the political process. (*First National Bank of Boston v. Bellotti, supra,* 435 U.S. at pp. 777, 789-792 [55 L.Ed.2d at pp. 725-728].)

In *Citizens Against Rent Control v. City of Berkeley, supra,* 27 Cal.3d 819, this court addressed the constitutionality of a Berkeley city ordinance that prohibited contributions of more than $250 per person to committees formed to support or oppose a ballot measure. The court held that the ordinance was necessary to serve the compelling governmental interest in preventing well-financed special interest groups from dominating the referendum process. (*Id.*, at pp. 825-829, 832.)

The United States Supreme Court reversed. (*Citizens Against Rent Control v. Berkeley, supra,* 454 U.S. 290 [hereafter *CARC*].) The high court reasoned that the pooling of financial resources was essential to effective

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[11] As of 1972, 1 percent of the population held over 20 percent of the nation's personal wealth. (See *Statistical Abstract, supra,* at p. 487, table No. 794.) Some 218,000 individuals possessed estates worth over $10 million each. (*Id.*, at p. 479, table No. 791.) As this court has recognized, such wealth can enable the possessor to exercise a disproportionate influence on the political process. (*Citizens Against Rent Control v. City of Berkeley* (1980) 27 Cal.3d 819, 826-827 [167 Cal.Rptr. 84, 614 P.2d 742], revd. *sub nom. Citizens Against Rent Control v. Berkeley, supra,* 454 U.S. 290 [70 L.Ed.2d 492, 102 S.Ct. 434].)

advocacy because of the rising costs of advertising and direct mail. (*Id.*, at p. 296, fn. 5 [70 L.Ed.2d at p. 499]; accord *Federal Election Commission v. National Conservative Political Action Committee* (1985) __U.S__, __[84 L.Ed.2d 455,__,105 S.Ct. 1459, 1459, 1467-1468].) Further, the court rejected this court's view that the city could restrict the use of concentrated wealth by special interest groups in order to assure others an equal voice in the political process. (*CARC, supra,* 454 U.S. at pp. 295-296 [70 L.Ed.2d at pp. 498-499].)

In *Claiborne Hardware, supra,* 458 U.S. 886, the high court made clear that its concern for effective advocacy was not limited to the expenditure of money, a form of economic power that is possessed primarily by the wealthy. Instead, the court extended the reasoning of *CARC* to cover the collective withholding of patronage, a form of economic influence available to ordinary consumers. (*Id.*, at pp. 907-915 [73 L.Ed.2d at pp. 1232-1238].)

The strike, a combination for the purpose of withholding labor, is no less essential to working people than was the pooling of wealth to the landlords in *CARC* or the collective withholding of purchasing power to the civil rights activists in *Claiborne Haraware.* While working people cannot compete with wealthy individuals or corporations in paying for access to mass communications, they can bring their causes to the public's attention by withholding the one asset that they possess in abundance—the capacity to engage in productive labor.

This court can scarcely deny to working people the protections that are accorded the forms of economic power possessed by other groups. As Justice Traynor once observed, the courts "should not impose ideal standards on one side [of a conflict among groups in society] when they

are powerless to impose similar standards upon the other." (*Hughes v. Superior Court*, *supra*, 32 Cal.2d at p. 868 (dis. opn. of Traynor, J.).)

It remains only to determine whether the common law's flat prohibition on public employee strikes is necessary to serve a compelling state interest. The majority have convincingly refuted the traditional justifications for that ban. (See maj. opn., *ante*, at pp. 573-580.) Although the state has a compelling interest in averting immediate and serious threats to the public health and safety, a flat ban on public employee strikes is by no means the least restrictive method for accomplishing that end. (See *id.*, at p. 580.) Accordingly, today's holding is compelled not only by common law principles but also by the California Constitition.

GRODIN, J., Concurring.—Though I have signed Justice Broussard's plurality opinion, I write separately in response to the concerns expressed in the concurring opinion by Justice Kaus.

I suggest there is little merit in attempting to distinguish, with regard to strikes by employees covered by the Meyers-Milias-Brown Act, between the availability of an injunction at common law and the availability of a damage action. If an injunction is violated, the violation can give rise to a proceeding in contempt for which monetary sanctions may be imposed. The underlying legal question is whether there exists a common law predicate for either remedy. The plurality opinion holds, and I agree that the Meyers-Milias-Brown Act has removed the principal theoretical justification which had been advanced in this state for the proposition that all strikes by local government employees are tortious. Finding no alternative justification sufficiently compelling to require acceptance by the courts in the absence of legislative action, except as regards strikes which

imperil public health or safety, the opinion properly places the ball in the Legislature's court, where it belongs. (*Ante*, p. 591, fn. 39.)

Other states and countries have developed a wide range of policies for dealing with public employee strikes, and the arena is clearly one in which experimentation should be encouraged. Consequently, I share Justice Kaus' concern that we should not attempt to prejudge the constitutionality of any particular legislative response. The plurality opinion explicitly finds it unnecessary to reach the issue in constitutional terms (*ante*, p. 591), and as I understand it discusses the Constitution only in order to demonstrate that were we to adopt the district's position—that there exists an absolute common law ban on public employee strikes in the context of the present statutory scheme—substantial questions of constitutional dimension would arise. (*Ibid.*). It is with that understanding that I join in the opinion.

LUCAS, J. —I respectfully dissent. In my view, public employees in this state neither have the right to strike, nor should they have that right. In any event, in light of the difficulty in fashioning proper exceptions to the basic "no strike" rule, and the dangers to public health and safety arising from even a *temporary* cessation of governmental services, the courts should defer to the Legislature, a body far better equipped to create such exceptions.

The majority paints a glowing picture of the public strike weapon as a means of "enhanc[ing] labor-management relations" (*ante*, p. 581), "equalizing the parties' respective bargaining positions," (p. 583), assuring "good faith" collective bargaining (p. 583), and "providing a clear incentive for resolving disputes" (p. 583). Indeed, so enamored is the majority with the concept of the public strike that it elevates this heretofore *illegal* device to a "basic civil liberty." (P. 583.) Though wholly unnecessary to its opinion, the majority in dictum even suggests that public employees may have a *constitutional* right to strike which cannot be legislatively abridged absent some "substantial or compelling justification." (P. 590.)

Thus, in the face of an unbroken string of Court of Appeal cases commencing nearly 35 years ago which hold that public strikes are illegal, we suddenly announce our finding that public strikes are not only lawful in most cases, but indeed they may constitute a panacea for many of the social and economic ills which have long beset the public sector. One may wonder, as I do, why we kept that revelation a secret for all these years. (See *El Rancho Unified School Dist. v. National Education Assn.* (1983) 33 Cal.3d 946, 962 [192 Cal.Rptr. 123, 663 P.2d 893] [conc. opn. by Richardson, J.].)

Despite the majority's encomiums, the fact remains that public strikes may devastate a city within a matter of days, or even hours, depending on the circumstances. For this reason, among many others, the courts of this state (and the vast majority of courts in other states and the federal government) have declared *all* public strikes illegal. As indicated above, until today the California Courts of Appeal uniformly had followed that rule. (See, e.g., *Stationary Engineers v. San Juan Suburban Water Dist.* (1979) 90 Cal.App.3d 796, 801 [153 Cal.Rptr. 666]; *Pasadena Unified Sch. Dist. v. Pasadena Federation of Teachers* (1977) 72 Cal.App.3d 100, 105-107 [140 Cal.Rptr. 41], hg. den.; *Los Angeles Unified School Dist. v. United Teachers* (1972) 24 Cal.App.3d 142, 145-146 [100 Cal.Rptr. 806], hg. den.; *Trustees of Cal. State Colleges v. Local 1352, S.F. State etc. Teachers* (1970) 13 Cal.App.3d 863, 867 [92 Cal.Rptr. 134], hg. den.; *City of San Diego v. American Federation of State etc. Employees* (1970) 8 Cal.App.3d 308, 310 [87 Cap.Rptr. 258], hg. den.; *Almond v. County of Sacramento* (1969) 276 Cal.App.2d 32, 35-36 [80 Cal.Rptr. 518], hg. den.; *Pranger v. Break* (1960) 186 Cal.App.2d 551, 556 [9 Cal.Rptr. 293], hg. den.; *Newmarker v. Regents of Univ. of Cal.* (1958) 160 Cal.App.2d 640, 646 [325 P.2d 558]; *City of L.A. v. Los Angeles etc. Council* (1949) 94 Cal.App.2d 36, 46-47 [210 P.2d 305], hg. den.)

Justice Coughlin's opinion in the *City of San Diego* case offers a cogent analysis of the various rationales underlying the "no strike" rule. He observed that "This California common law rule is the generally accepted common law rule in many jurisdictions. [Citations, including cases from 24 states.]

"The common law rule has been adopted or confirmed statutorily by 20 states and the federal government. [Citations.]

". . . The common law rule [that] public employees do not have the right to bargain collectively or to strike is predicated expressly on the necessity for and lack of statutory authority conferring such right. Where a statute authorizes collective bargaining and strikes it includes them within the methods authorized by law for fixing the terms and conditions of employment. *Those who advocate the right of public employees to strike should present their case to the Legislature.* [Italics added.]

". . . . . .

"Wherever the issue has been raised, it has been held laws governing the rights of public employees to engage in union activities, collective bargaining, strikes and other coercive practices, not equally applicable to private employees, and vice versa, are premised on a constitutionally approved classification; and, for this reason, are not violative of the constitutional guarantee of equal protection of the law. [Citations.] [¶] The reasons for the law denying public employees the right to strike while affording such right to private employees are not premised on differences in types of jobs held by these two classes of employees but upon differences in the employment relationship to which they are parties. The legitimate and compelling state interest accomplished and promoted by the law denying public employees the right to strike is not solely the need for a particular governmental service but the preservation of a system of government in the ambit of public employment and the proscription of practices not compatible with the public employer-employee relationship. [Citation.]" (8 Cal.App.3d at pp. 311-315.)

The decision to allow public employee strikes requires a delicate and complex balancing process best undertaken by the Legislature, which may formulate a comprehensive regulatory scheme designed to avoid the disruption and chaos which invariably follow a cessation or interruption of governmental services. The majority's own proposal, to withhold the strike weapon only where "truly essential" services are involved (p. 580) and a "substantial and imminent threat" is posed (p. 586), will afford little guidance to our trial courts who must, on a "case-by-case" basis (p. 586), decide such issues. Nor will representatives of labor or management be able to predict with any confidence or certainty whether a particular strike is a lawful one or, being lawful at its inception, will become unlawful by reason of its adverse effects upon the public health and safety. In short, the majority's broad holding will prove as unworkable as it is unwise.

Of the few states that permit strikes by public employees, virtually all do so by comprehensive statutory provisions. Some of the statutory schemes begin by creating classifications of employees, distinguishing, for example, workers whose services are deemed essential (e.g., police, firefighters), those whose services may be interrupted for short periods of time (e.g., teachers), and those whose services may be omitted for an extended time (e.g., municipal golf course attendants).[1] These schemes typically define various prerequisites to the exercise of the right to strike for those categories of workers permitted that option.

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[1] See Alaska Statutes section 23.40.200(a) (1972) (categorizing, first, all police, fire, correctional, and hospital workers; second, public utility, snow removal, sanitation, and education employees; and third, all other public workers). See also Minnesota Statutes Annotated section 179A.03 (West Supp. 1985) (defining "essential" workers, etc.).

The prerequisities include a period of mandatory mediation[2] as well as advance notice to the employer.[3] In addition, some statutory schemes lay out the ground rules for binding arbitration.[4]

In contrast, the majority's new California rule is hopelessly undefined and unstructured. In addition to the breadth of the majority's "truly essential" standard, the statutes presently provide no systematic classification of employees according to the nature of their work and the degree to which the public can tolerate work stoppages. Only firefighters are expressly prohibited from striking and giving recognition to picket lines. (Lab. Code, § 1962.) Moreover, the four principal statutory schemes regulating other public employees establish widely differing approaches to labor relations for different types and levels of employees. (Compare Gov. Code §§ 3500-3510 [Meyers-Milias-Brown Act, covering local government employees]; 3512-3524 [State Employer-Employee Relations Act,

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[2] E.g., Alaska Statutes section 23.40.200(c) (1972) (mediation required); Illinois Public Act 83-1012, section 17 (1983) (Ill. Legis. Serv. 6781, to be codified at Ill. Ann. Stat. Ch. 48, § 1617) (mediation required); Minnesota Statutes Annotated section 179A.18, subdivisions 1, 2 (West Supp. 1985) (mediation required for 45 days, 60 days in case of teachers); Pennsylvania Statutes Annotated title 43, section 1101.1003 (Purden Supp. 1984) (mediation required); Wisconsin Statutes Annotated section 111.70(4)(cm) (West Supp. 1983) (mediation-arbitration required).

[3] E.g., Illinois Public Act 83-1012, section 17 (5 days' notice required); Minnesota Statutes Annotated section 179A.18 (West Supp. 1985) (10 days); Wisconsin Statutes Annotated section 111.70(4)(cm) (West Supp. 1983) (10 days).

[4] E.g., Minnesota Statutes Annotated section 179A.16 (West Supp. 1985); Wisconsin Statutes Annotated section 111.70(4)(jm) (West Supp. 1983).

covering state employees]; 3540-3549.3 [Ed. Employment Relations Act, covering public school employees]; 3560-3599 [governing employment in higher education].) Thus, these statutes produce inconsistent results when, as here, the right to strike is given recognition almost across the board.

The Meyers-Milias-Brown Act, for example, provides "no clear mechanism for resolving disputes" between local governments and their workers. (*Ante*, p. 572, fn. 14.) In the absence of an administrative agency to settle charges of unfair labor practices and compel such remedies as mediation, presumably all strike-related issues will go to the courts in the first instance, but the courts are poor forums for the resolution of such issues. On the other hand, issues arising out of work stoppages by public school employees are to be resolved by the Public Employee Relations Board (PERB) on the basis of PERB's own set of remedies. Of course, this anomalous situation is in large part the product of this court's tolerance of strikes by teachers (*El Rancho Unified Sch. Dist. v. National Ed. Assn.*, *supra*, 33 Cal.3d 946; *San Diego Teachers Assn. v. Superior Court* (1979) 24 Cal.3d 1 [154 Cal.Rptr. 893, 593 P.2d 838]) and PERB's correlative expansion of its authority so that it may compel mediation or adopt other remedies in labor disputes in public education (see Cal. Admin. Code, tit. 8, § 32000 et seq.).

Finally, nothing in PERB's explicit statutory powers (Gov. Code, § 3541.3) extends to mandatory arbitration, for example, so it remains to be established whether state employees, also under PERB's jurisdiction (*id.*, § 3513, subd. (g)), will be governed by the same ground rules as educational employees, or whether some of them, perhaps deemed "truly essential," will be subject to binding arbitration under rules that do not now exist.

I would affirm the judgment.

APPENDIX B

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

2 Civil 66088
(Super.Ct. No. C 166219)

COUNTY SANITATION DISTRICT NO. 2 OF LOS ANGELES COUNTY,
a public agency,

Plaintiff and Respondent,

vs.

LOS ANGELES COUNTY EMPLOYEES ASSOCIATION, LOCAL 660, SERVICE EMPLOYEES INTERNATIONAL UNION AFL-CIO; VICTOR N. HOCHEE, HARRY GLUCK, JACK ROBERTS, ANTHONY BUTKA EUGENE MILLER, GARY SCHALANDER, BILLY MANNING,

Def ndants and Appellants.

APPEAL from a judgment of the Superior Court of Los Angeles County. Charles H. Older, Judge. Modified and affirmed.

Geffner & Satzman, by Leo Geffner, for Defendants and Appellants.

Musick, Peeler & Garrett, by Stuart W. Rudnick, Steven D. Weinstein, and Neil O. Andrus, for Plaintiff and Respondent.

George Agnost, City Attorney, and Phillip S. Ward and Steven A. Diaz, Deputy City Attorneys, Amicus Curiae.

Defendants Los Angeles County Employees Association, Local 660, Service Employees International Union, AFL-CIO; Victor N. Hochee; Harry Gluck; and Jack Roberts (Local 660) appeal from the judgment awarding plaintiff County Sanitation District No. 2 of Los Angeles County (District) damages in the sum of $246,904, prejudgment interest in the amount of $87,615.22 and costs of $874.65.

Local 660 contends: "[I.] Whether a public employees strike provides a tort cause of action for damages is an unresolved issue in California. [II.] The trial court committed prejudicial error in granting excessive, unreasonable and unlawful compensatory damages."

The District is a public agency organized pursuant to the provisions of the County Sanitation District Act (Health & Saf. Code, §§ 4700-4789) and is charged with providing, operating and maintaining sewage transport and treatment facilities and landfill refuse disposal sites throughout the County of Los Angeles.[1] It employs some 500 workers who are directly or indirectly responsible for the operation and maintenance of its facilities and who are members of, or represented by, Local 660.

At 10 p.m. on July 5, 1976, approximately 75 percent of these workers went out on strike after negotiations between the District and Local 660 for a new wage and benefit agreement had reached an impasse. The strike continued until July 16, at which time the employees voted to accept

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[1] In 1976 the facilities operated by the District included six sanitary landfills which together received about 15,000 tons of solid waste each day, eleven treatment plants processing 450 million gallons of raw sewage each day, four maintenance yards and 46 pumping stations.

an offer made by the District prior to the strike, i.e., July 1, 1976, and to return to work the following day. In the interim, the District had filed the instant action for injunctive relief and damages on July 6, 1976.

Much has been written on the subject of labor relations in the public sector, including the advisability of granting public employees full collective bargaining rights and, more particularly, the right to strike. (See, e.g., Hanslowe and Acierno, *The Law and theory of Strikes By Government Employees* (1982) 67 Cornell L.Rev. 1055; Comment, *Public Employee Legislation: An Emerging Paradox, Impact, and Opportunity* (1976) 13 San Diego L.Rev. 931; Comment, *California Assembly Advisory Council's Recommendations on Impasse Resolution Procedures and Public Employee Strikes* (1974) 11 San Diego L.Rev. 473; Comment, *The Collective Bargaining Process at the Municipal Level Lingers in Its Chrysalis Stage* (1974) 14 Santa Clara Law. 397; Grodin, *Public Employee Bargaining in California; The Meyers-Milias-Brown Act in the Courts* (1972) 23 Hastings L.J. 719; Shaw and Clark, *The Practical Differences Between Public and Private Sector Collective Bargaining* (1972) 19 U.C.L.A. L.Rev. 867; Lev, *Strikes by Government Employees: Problems and Solutions* (1971) 57 Amer. Bar Assoc. J. 771; Witt, *The Public Sector Strike: Dilemma of the Seventies* (1971) 8 Cal. Western L.Rev. 102; Bernstein, *Alternatives to the Strike in Public Labor Relations* (1971) 85 Har.L.Re. 459; Burton and Krider, *The Role and Consequences of Strikes by Public Employees* (1970) 79 Yale L.J. 418; Wellington and Winter, *More on Strikes by Public Employees* (1970) 79 Yale L.J. 441; Kheel, *Strikes and Public Employment* (1969) 67 Mich.L.Re. 931; Anderson, *Strikes and Impasse Resolution in Public Employment* (1969) 67 Mich.L.Rev. 943; Wellington and Winter, *The Limits of Collective Bargaining in*

Public Employment (1969) 78 Yale L.J. 1107; Thorne, *The Government Employee and Organized Labor* (1962) 2 Santa Clara Law. 147; Note, *Labor Relations in the Public Sector* (1961) 75 Harv.L.Rev. 391; Annot., Labor Law: Right of Public Employees to Strike or Engage in Work Stoppage (1971) 37 A.L.R.3d 1147.)

The California Assembly Advisory Council on Public Employee Relations in its final report of March 15, 1973, concluded that, "[s]ubject only to [certain specified] restrictions and limitations . . . public employees should have the right to strike" (p. 24) and proposed a statute to carry out these goals (Appendix A). Nevertheless, the Legislature "has steadfastly refrained from providing clearcut guidance" in this area. (*El Rancho Unified School Dist. v. National Education Assn.* (1983) 33 Cal.3d 946, 964 (conc. opn. of Grodin, J.).)

No recent decision of our Supreme Court has squarely passed upon the legality of strikes by public employees, although in *Los Angeles Met. Transit Authority v. Brotherhood of Railroad Trainmen* (1960) 54 Cal.2d 684, wherein the Los Angeles Metropolitan Transit Authority Act was held to authorize strikes by employees of that agency, the court stated: "In the absence of legislative authorization public employees in general do not have the right to strike . . . ." (*Id.*, p. 687.) With complete uniformity the District Courts of Appeal have treated this declaration as establishing a general rule — and have honored it. (See, e.g., *Stationary Engineers v. San Juan Suburban Water Dist.* (1979) 90 Cal.App.3d 796, 801; *Pasadena Unified Sch. Dist. v. Pasadena Federation of Teachers* (1977) 72 Cal.App.3d 100, 105-107, hg. den.; *Los Angeles Unified School Dist. v. United Teachers* (1972) 24 Cal.App.3d 142, 145-146, hg. den.; *Trustees of Cal. State Colleges v. Local*

1352, S.F. State etc. Teachers (1970) 13 Cal.App.3d 863, 867, hg. den.; *City of San Diego v. American Federation of State etc. Employees* (1970) 8 Cal.App.3d 308, 310, hg. den.; *Almond v. County of Sacramento* (1969) 276 Cal.App.2d 32, 35-36, hg. den.; *Pranger v. Break* (1960) 186 Cal.App.2d 551, 556, hg. den.; see also, the earlier appellate decision in *Newmarker v. Regents of Univ. of Cal.* (1958) 160 Cal.App.2d 640, 646; *City of L.A. v. Los Angeles etc. Council* (1949) 94 Cal.App.2d 36, 41, hg. den.) Although hearings have been granted in several most recent appellate court decisions, our highest court to date has declined to reach the question of the continuing validity of its earlier pronouncement. (*International Brotherhood of Electrical Workers v. City of Gridley* (1983) 34 Cal.3d 191; *El Rancho Unified School Dist. v. National Education Assn., supra,* 33 Cal.3d 946; *San Diego Teachers Assn. v. Superior Court* (1979) 24 Cal.3d 1; *City and County of San Francisco v. Cooper* (1975) 13 Cal.3d 898.)

Local 660 argues that prohibiting public employees from striking and subjecting those who engage in such activities to actions for damages is contrary to public policy and inconsistent with "modern society" and that it results in a deprivation of basic constitutional rights. However, it has heretofore been held that the "conduct of an unlawful strike is itself a tort for which damages may be recovered" (*Pasadena Unified Sch. Dist. v. Pasadena Federation of Teachers, supra,* 72 Cal.App.3d 100, 112; Annot., Liability of Labor Union or Its Membership for Torts Committed by Officers, Members, Pickets, or Others, in Connection with Lawful Primary Labor Activities (1971) 36 A.L.R.3d 405; and Annot., Damage Liability of State or Local Public Employees' Union or Union Officials for Unlawful Work Stoppage (1978) 84 A.L.R.3d 336), and that the enforcement of the prohibition against such strikes is not

violative of the constitutional rights of free speech and association or the guarantee of equal protection of the law.[2] (*Pasadena Unified Sch. Dist. v. Pasadena Federation of Teachers, supra,* 72 Cal.App.3d 100, 104-110; *Los Angeles Unified School Dist. v. United Teachers, supra,* 24 Cal.App.3d 142, 144-146; *City of San Diego v. American Federation of State etc. Employees, supra,* 8 Cal.App.3d 308, 313.)

Insofar as Local 660 asserts the District did not engage in fair bargaining, thereby violating the Meyers-Milias-Brown Act and entitling its employees to "engage in economic action in order to obtain a reasonable settlement," it has been noted that the Meyers-Milias-Brown Act "falls far short of constituting a legislative authorization of a right to strike as a means of settling public employer-employee differences" (*Almond v. County of Sacramento, supra,* 276 Cal.App.2d 32, 38), and, further, the prohibition against public employee strikes has been deemed to apply whether

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[2] Local 660's averments notwithstanding, the strike giving rise to the instant litigation involved more than "peaceful picketing" as was the case in *Lamphere Sch. v. Lamphere Fed. of Teachers* (1977) 400 Mich. 104, 252 N.W.2d 818, 826. (See footnote 4, *post.*)

With respect to Local 660's claim that the "application of equal protection is more apparent since *El Rancho* prohibited the superior court from holding the teachers union liable for damages," we note the court in that case held merely that the Education Employment Relations Act (Gov. Code, § 3540 et seq.) divests a superior court of jurisdiction to entertain a school district's tort suit for damages arising out of a teachers' strike led by noncertified unions, since the Public Employees Relations Board "has exclusive initial jurisdiction to determine whether such a strike is an unfair practice and what, if any, remedies should be pursued." (*El Rancho Unified School Dist. v. National Education Assn., supra,* 33 Cal.3d 946, 961.) It did not specifically declare damages could never be available as a remedy.

an employer "violates the Meyers-Milias-Brown Act or not. [Citations.]" (*Stationary Engineers v. San Juan Suburban Water Dist.* (1979) 90 Cal.App.3d 796, 801.)

While we recognize that often "coming events cast their shadows before" and certain expressions in decisions such as *International Brotherhood of Electrical Workers v. City of Gridley, supra,* 34 Cal.3d 191, 199, fn. 7; *El Rancho Unified School Dist. v. National Education Assn., supra,* 33 Cal.3d 946, 957-958, 962-964; *San Diego Teachers Assn. v. Superior Court, supra,* 24 Cal.3d 1, 6-7, 13; and *City and County of San Francisco v. Cooper, supra,* 13 Cal.3d 898, 912, may have prophetic value, as an intermediate appellate court we remain bound by the presently well-settled rules that deny public employees the right to strike and which subject those who do engage in such unlawful labor practices to tort actions for damages. If these rules should no longer represent the considered view of our Supreme Court, it is the exclusive province of that body to so declare.

On the question of damages the trial court determined that "[i]n order to assure the maintenance of essential public services during the . . . strike, [the District] assigned certain non-striking employees to work extended hours at various of its facilities, and compensated such employees at appropriate rates of overtime pay or compensatory time off for the extra hours served at such facilities during the strike." Specifically, it found the District had "paid overtime compensation in the amount of $301,989; extra FICA payments in the amount of $2,238; and provided compensatory time off having a value of $16,040." The court also ascertained the District reasonably had expended $55,080 "to provide meals, equipment rental, security guard services, and other expenses reasonably related to the

maintenance of its sewage treatment and land fill operations" during the course of the strike.

The court additionally concluded, however, that these strike-related costs, as well as the $6,000 the District had paid in health care benefits for the striking employees during the period of the strike, were subject to an offset in the amount of $134,443, since the District "was not required to compensate [striking] employees . . . ," thereby saving "$112,649 in unpaid salaries; $4,490 in FICA; [ ] $8,312 in retirement [;]" and "$8,992 that would have been paid to the striking employees as overtime if they had remained on the job." As a consequence, the court determined the net monetary damage to the District as a "direct and proximate result" of Local 660's "tortious conduct" to be $246,904.

Local 660's challenge to the accuracy and adequacy of the District's overtime records and the reasonableness of the District's staffing of its various facilities during the duration of the strike is in effect an invitation to us to reweigh the evidence and arrive at a result more favorable to its membership. This we cannot do. "[O]ur reviewing power begins and ends with the determination whether there is any substantial evidence to support the trial court's findings." [Citation.] (*Thompson v. Occidental Life Ins. Co.* (1973) 9 Cal.3d 904, 917.)

Local 660 maintains the District's "records were inherently untrustworthy, as they were based on information given by employees who themselves had a personal interest in exaggerating the amount of overtime." In the absence of any evidence to support such a conclusion, we are unwilling to presume the employees falsely certified the accuracy of the hours set forth on their pay reports. The District's payroll records, introduced as exhibits at trial,

provided ample support of the number of overtime hours worked by employees during the strike.[3]

Substantial evidence also supports the trial court's finding that the District undertook reasonable steps to insure the continued operation of essential sanitary landfill and sewage treatment services to approximately four million residents of the County of Los Angeles by hiring security personnel and assigning a number of nonstriking employees to work extended hours at various facilities.

In support of its allegation that the District's strike-related expenses were excessive, Local 660 presents an extended examination of the security measures and level of staffing which, in its view, would have been appropriate. Even if this analysis might appear to be reasonable, at least in hindsight, that fact alone would not compel the conclusion that the District's plan was unreasonable.

At the time the District's strike contingency plan was implemented, it was not known how extensive the strike activity would be or the form it would take. However, given the critical nature of the services provided by the District, the potential for sabotage and vandalism,[4] and the

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[3] Insofar as there may have been some evidence that a few employees were credited erroneously with having earned strike-related overtime, the trial court was, of course, free to reject it. (*Green Trees Enterprises, Inc. v. Palm Springs Alpine Estates, Inc.* (1967) 66 Cal.2d 782, 787.)

[4] In 1974 "substantial numbers" of the District's workers had engaged in a five-day strike during which there apparently was a significant amount of vandalism at the landfills. When faced with the possibility of the instant walkout in 1976, the District developed a strike contingency plan designed to rectify the deficiencies in its previous response.

Notwithstanding such efforts, however, the 1976 strike did not proceed without incident. On July 5, management personnel replacing striking workers at the Joint Water Pollution Control Plant (JWPCP),

replacement workers' lack of experience, and consequent inefficiency in carrying out even the routine duties of the striking employees, the District would have been remiss had it simply replaced those workers on strike and maintained a "regular" work schedule. On the other hand, of course, if the District had capitalized on the crisis, as Local 660 suggests, to "help [ ] itself . . . on the expectation that [the] Union could pay for this 'windfall', " it would not be entitled to full compensation for the expenses incurred. We are conviced by the record before us that the District undertook only those precautions which in its best judgment were legitimately required to guarantee the security and continued operation of its facilities. It would ill behoove us

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the District's largest sewage treatment facility, discovered a plywood disk concealed in a sludge line. In addition, a locked plant vehicle, from which the keys had been removed, was found blocking the entrance to the maintenance building and a mechanized gate was damaged and rendered inoperable, thereby breaching plant security. Entrances to the work site were routinely strewn with roofing tacks and broken glass.

On the afternoon of July 6 it was discovered that on the three days preceding the strike, "[o]perations personnel [had] increased sludge pumping to abnormally high rates from the primary sedimentation tanks to the anaerobic digesters. This act reduced biological activity in the digesters and substantially reduced the production of methane gas. Since most of the plant facilities rely on methane gas for power production, emergency measures were required to be taken to conserve gas for the most critical operations." JWPCP is designed such that any significant delay in starting the effluent pumps could cause the plant to "flood out." Although the plant contained an emergency standby generator, its battery cables had been cut.

On July 6 and July 16 debris of a type and magnitude that "does not normally enter the sewer system," e.g., an inner-spring mattress, tires, a canvas tarpaulin, upholstered cushions, carpeting and cabinet doors were removed from the bar screens at JWPCP. On the latter date the chains that drive the bar screens were broken as a result of the debris.

to "second guess" these decisions at this late date, even if it were otherwise permissible to do so.

With respect to those employees who were required to be on duty 24 hours per day with no guarantee of uninterrupted sleep or meals, it was entirely fitting that they be fully compensated therefor, even though a portion of their time was in fact devoted to eating, sleeping or "leisure" activities, such as reading or card-playing. (*Armour & Co. v. Wantock* (1944) 323 U.S. 126; *Skidmore v. Swift & Co.* (1944) 323 U.S. 134; *General Electric Co. v. Porter* (1953) 208 F.2d 805; 29 C.F.R. 785, et seq.) Similarly, such employees were entitled to meals at the employer's expense.

Local 660 urges error in the trial court's assessment of damages on the basis of compensatory time off granted to several District employees, asserting that in the absence of any evidence replacements were hired for such employees, there could be no labor cost associated with this benefit. We disagree. When an employee receives compensatory time off, whether for vacation, sick leave, or as here, in lieu of monetary payment for overtime, the employer is, in effect, paying for services it does not receive. While the remaining employees may "take up the slack," at least to the extent the size of the labor force originally was inflated to accommodate a certain number of nonproducing employees, such a system clearly is not without cost to the employer.[5] Though it may be difficult to determine in any given case whether that cost is actually equivalent to the nonproducing employee's earnings, as a general rule such a measure appears to be a fair one.

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[5] The fact that the District's employees at the time of trial might not have utilized their time off does not alter this conclusion.

Local 660 further contends the trial court improperly utilized a time and one-half formula to calculate the damages incurred by the District for overtime compensation to managerial personnel working during the strike. We agree.

The Salary Resolution in effect at the time of the strike[6] provides a three-tiered formula, tied to monthly salary, for payment of overtime to managerial personnel. While the resolution does specify those employees whose basic monthly salaries are at the lowest levels are entitled to time and one-half, those receiving mid-range salaries are to be compensated at specified hourly rates, and those at the upper salary ranges are to receive straight time rates of compensation.

The District has not shown the existence of any other provision, whether by ordinance, resolution or memo of understanding, which permits the payment of time and one-half to *all* managerial personnel under *any* circumstances. Nevertheless, it urges that the Salary Resolution "is addressed [only] to the District's normal, day-to-day operation" and "was never intended to apply to an extraordinary or emergency situation, such as the strikes in 1974 and 1976, and did not, therefore, render inappropriate the overtime policy during the strike."

It is well settled that a "public employee is entitled only to such compensation as is expressly provided by statute or ordinance regardless of the extent of services actually rendered. [Citations.]" (*Markman v. County of Los Angeles*

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[6] The Resolution, which sets the level of wages, hours, salaries, fringe benefits, and other terms and conditions of employment, was approved and adopted by a vote of the District's Board of Directors, functioning as the governing body of the District. (Health & Saf. Code, § 4730.)

(1973) 35 Cal.App.3d 132, 135.) "In the absence of a provision which provides for such payment, no such payment is authorized." (*Van Riessen v. City of Santa Monica* (1976) 63 Cal.App.3d 193, 199; *Longshore v. County of Ventura* (1979) 25 Cal.3d 14, 22-23.)[7]

The District also argues that notwithstanding the Salary Resolution, its mangerial employees were entitled to overtime compensation at one and one-half times their regular rate of pay under the Fair Labor Standards Act of 1938. (29 U.S.C. § 201 et seq.)

The Fair Labor Standards Act (FLSA), enacted by Congress forty-five years ago, requires employers covered thereby to pay their employees a minimum hourly wage (29 U.S.C. § 206(a)) and to pay them at one and one-half times their regular rate of pay for hours worked in excess of 40 per week (29 U.S.C. § 207(a)).[8] Expressly exempted from the provisions of sections 206 and 207 are those employees "employed in a bona fide executive, administrative, or

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[7] So far as the record reveals, overtime compensation at the rate of time and one-half was paid upon the verbal instructions of the District's Chief Engineer. Nothing contained within the April 1, 1976, amended joint administration agreement entered into by the twenty-seven sanitation districts of Los Angeles County supports a finding that the power to authorize employee compensation at variance with that contained in the Salary Resolution was delegated to this individual. Neither does section 6522 of the Health and Safety Code, which permits the District to "do any act necessary or proper to the complete exercise and effect of any of its powers, or for the purposes for which it is formed," justify the action of the Chief Engineer.

[8] The original Act specifically excluded the states and their political subdivisions from its coverage. In 1974, however, Congress enacted a series of broadening amendments which extended the minimum wage provisions to almost all public employees. (29 U.S.C. §§ 203(d); 203(e)(2)(C); 203(x).)

professional capacity" (29 U.S.C. § 213(a)), hereinafter referred to collectively as "managerial" personnel.[9]

Whether an employee is a managerial employee may be determined in one of two ways under FSLA regulations promulgated by the Secretary of Labor. (29 C.R.R. §§ 541.1; 541.2; 541.3.) These regulations establish different legal tests according to salary level, with employees earning less than $250 per week being subject to the so-called "long test," while those earning $250 or more are governed by the "short test." (*Donovan v. Burger King Corp.* (1982) 675 F.2d 516, 518.)

At issue here is whether the District's high-salaried employees lost their exempt status from the Act's overtime pay provisions when they deviated from their normal duties and performed nonexempt work during the strike.[10]

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[9] The District's Salary Resolution contains the following provisions relating to nonexempt and exempt employees:

> "5.1A 'Non Exempt employees' means employees who would be subject to the provisions of the Federal Fair Labor Standards Act, if the Act were applicable to [the] Districts' employees. Non exempt employees who are ordered by the Districts to work overtime, as defined in the Federal Fair Labor Standards Act, will be paid at the rate specified in the Act for such ordered overtime . . . ."
>
> "5.1B 'Exempt employees' means employees who would not be subject to the provisions of the Federal Fair Labor Standards Act, if the Act were applicable to [the] Districts' employees

[10] "There is no difficulty in determining when exempt status is lost through the performance of nonexempt work by a managerial employee under the long tests. If a long test managerial employee spends more than 20 percent of his time in a given workweek performing nonexempt work, the managerial exemption is lost. See 29 C.F.R. §§ 541.1(e); 541.2(d); 541.3(d)." (*Marshall v. Western Union Tel. Co.* (1980) 621 F.2d 1246, 1250.) However, this is of no moment in the instant case,

Under the short test, managerial status is determined by reference to the employee's "primary duty" as an employee. (29 C.F.R. §§ 541.1(f); 541.2(e); 541.3(e).) Although the regulations do furnish some guidance on what is meant by primary duty (29 C.F.R. §§ 541.103; 541.206; 541.304), they provide no basis for measuring such duty in any specific time frame. Nevertheless, we are persuaded by the discussion of the United States Court of Appeals for the Third Circuit in *Marshall v. Western Union Tel. Co., supra,* 621 F.2d 1246, that there is no rationale in the underlying theory or policy of FLSA which would warrant paying high-salaried managerial personnel overtime at one and one-half times their base salary for time worked in excess of forty hours, even if during any workweek they spent the major portion of their time on nonexempt work:[11]

> "Although a workweek standard is indeed a fundamental part of FLSA, the exemption of managerial employees from the general coverage of the Act confirms our view that they were not

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since any District managerial employees who earned less than $250 per week were entitled to time and one-half under the Salary Resolution itself.

[11] The first time the *Western Union* case was before the Third Circuit it held "no more than that managerial personnel who perform strike duty are not necessarily exempt" and directed the district court to decide "if, under the regulations, the determination of whether an employee is 'employed in a bona fide executive . . . capacity' is to be made with respect to each week separately or with respect to a broader period of time." (*Brennan v. Western U. Tel. Co.* (1977) 561 F.2d 477, 483.)

Upon remand, the district court adopted a standard "by which the exempt status of managerial employees would be determined through an evaluation *each week* of the 'primary duty' of the employee." (*Marshall v. Western Union Tel. Co., supra,* 621 F.2d 1246, 1248; emphasis added.) The *Marshall* court reversed.

within the scope of Congress' concerns in enacting this legislation. The reason is plain: the underlying and declared purpose of FLSA is to eradicate from interstate commerce conditions detrimental to 'the maintenance of a minimum standard of living necessary for health, efficiency, and general well-being of workers.' 29 U.S.C. § 202(a) (1976). Thus, FLSA bans from interstate commerce products produced through the imposition of lengthy hours of work at low wages. [Citation.]

"Specifically, the Act was manifestly designed to place a floor under wages and a ceiling over hours of employment. The limitation in hours also served the purpose during a time of extraordinary unemployment and depressed wages of spreading the work and providing extra compensation for overtime. [Citation.] Setting a floor under wages and a ceiling over normal hours of employment had the further purpose of eliminating from commerce the evils attendant upon low wages and long hours of service. [Citations.] Thus, the forty-hour provision of the Act is an essential element in spreading the work among the rank and file and compensating an employee in a specific manner for the strain of working longer than forty hours. [Citation.] There is nothing in the Act that demonstrates Congress had these concerns in mind for managerial employees and that it, therefore, intended that the workweek standard also be applied to them in measuring their exempt status.

> "Managerial employees, particularly executives, generally direct and operate a business enterprise. Because they have the power to direct, supervise, and manage the operations and are paid accordingly, granting managerial employees exempt status must have been a recognition that they are seldom the victims of substandard working conditions and low wages. Congress apparently acted on this basic principle of industrial organization, realizing that compensation and working conditions of managerial employees normally would be significantly above those of the hourly wage earner. Therefore, there was no need for Congress to be concerned about the number of hours worked per week or the hourly wage for them . . . ." (*Marshall v. Western Union Tel. Co., supra,* 621 F.2d 1246, 1250-1251.)[12]

We, therefore, hold that the District's managerial employees retained their exempt status during the strike and, consequently, the trial court erred when it failed to apply the terms of the Salary Resolution to determine the amount of compensation to which these employees were entitled for working overtime during the strike.[13] According to evidence introduced at trial, which the parties do not appear to dispute, utilization of the Resolution would have

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[12] Moreover, such a standard would be most impractical to implement. (*Marshall v. Western Union Tel. Co., supra,* at pp. 1251-1252.)

[13] Ironically, in the absence of this Resolution if the rights of the exempt employees here were to be determined solely under federal statutory law, they would be entitled to no overtime compensation whatsoever.

resulted in total damages to the District of $298,257, broken down as follows: overtime costs, including those attributable to compensatory time off, of $241,174; FICA contributions of $2,003; and out of pocket damages, which remain unchanged by the present valuation, of $55,080. From this total must be deducted offsets in the sum of $134,443,[14] reducing the District's net damages and Local 660's liability to $163,814.

Finally Local 660 contends that the court erred in granting prejudgment interest. In opposition the District maintains "[t]he trial court properly awarded prejudgment interest both as a matter of sound discretion [pursuant to Civil Code section 3288] and as a matter of law [pursuant to subdivision (a) of Civil Code section 3277]."

In the absence of any indication that the interest award represented an exercise of the court's discretion under section 3288,[15] we assume it was made pursuant to

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[14] As we mentioned previously, the trial court reduced the District's damages by $134,443 to account for withheld salaries ($112,649); FICA contributions ($4,490); retirement contributions ($8,312); and overtime ($8,992) of striking workers.

We have not diminished these offsets by the $6,000 the District claimed it had paid toward striking employees' health insurance during the period of the strike. The evidence at trial uncontrovertibly demonstrated the District was not billed on a prorated basis for such benefits, but on the contrary, was required to contribute its full share of the employee's monthly premium, if the employee worked but a single day during any given month.

[15] We reject the District's contention that the court "acting under its equitable 'clean up' powers had discretion to award prejudgment interest." A similar claim was made with regard to the special damages award and is likewise unpersuasive. Moreover, to the degree the court based the awards upon this ground, it erred.

Where as here, "legal and equitable remedies are sought in the same

subdivision (a) of section 3287, which establishes the right of a plaintiff to recover prejudgment interest whenever the amount of damages is liquidated, i.e., "certain, or capable of being made certain by calculation, . . ."

The certainty requirement was present in the instant case for once the District's entitlement to recovery of overtime-related expenses was established, the calculation thereof was readily accomplished by resort to simple mathematics. (See generally *Leff v. Gunter* (1983) 33 Cal.3d 508, 519-520; *Tripp v. Swoap* (1976) 17 Cal.3d 671, 681-682.) The fact that unliquidated setoffs may have existed does not preclude allowance of prejudgment interest. (*Leaf v. Phil Rauch, Inc.* (1975) 47 Cal.App.3d 371, 376.) The same can be said with respect to claims for costs clearly incurred after the strike. Such errors are minor and easily correctable. (See *Coleman Engineering Co. v. North American Aviation, Inc.* (1966) 65 Cal.2d 396, 408-409; *Charlton v. Pan American World Airways* (1953) 116 Cal.App.2d 550, 554-555.)

The judgment is modified to reduce damages from $246,904 to $163,814 and, as so modified, is affirmed.

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action, each remedy is governed by the law that would apply to it if the other remedy had not been requested." (*Crouser v. Boise* (1942) 51 Cal.App.2d 198, 200.) The material at 38 Cal.Jur.3d, Injunctions § 91, cited by the District sets forth the well known, but here irrelevant, principle that a court of equity having once acquired jurisdiction of the subject matter of an action is justified in retaining it until all issues in the action have been determined. (*Union Oil Co. v. Reconstruction Oil Co.* (1937) 20 Cal.App.2d 170, 183.) Even in such cases, however, the legal issues are resolved by application of legal principles. (*Id.*, p. 184.)

CERTIFIED FOR PUBLICATION

_____, J.
GATES

We concur:

_____, J.
ROTH

_____, J.
COMPTON

CERTIFIED FOR PUBLICATION

**IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO**

2 Civil 66088
(Super.Ct.No. C 166219)

COUNTY SANITATION DISTRICT NO. 2 OF LOS ANGELES COUNTY,
a public agency,

Plaintiff and Respondent,

v.

LOS ANGELES COUNTY EMPLOYEES ASSOCIATION, LOCAL 660, SERVICE EMPLOYEES INTERNATIONAL UNION AFL-CIO; VICTOR N. HOCHEE, HARRY GLUCK, JACK ROBERTS, ANTHONY BUTKA, EUGENE MILLER, GARY SCHALANDER, BILLY MANNING,

Defendants and Appellants.

MODIFICATION OF OPINION

The above entitled opinion filed on October 12, 1983, is hereby modified as follows:

1. The sentence in the body of the opinion beginning on page 23 and continuing to page 24 which reads:

> From this total must be deducted offsets in the sum of $134,443,[14] reducing the district's net damages and Local 660's liability to $163,814.

is stricken and replaced with the following:

> After deducting from this total the offsets allowed by the trial court in the sum of $134,443,[14] the District's net damages and Local 660's liability is $163,814.

2. The following is added as a further paragraph to present footnote 14 on page 24:

> The trial court's election to offset salary savings as part of its damages formula not having been challenged on this appeal, we express no opinion concerning the necessity therefor.

APPENDIX C

SUPERIOR COURT
OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

CASE NO. 166 219

COUNTY SANITATION DISTRICT NO. 2
OF LOS ANGELES COUNTY,
a public agency,

Plaintiff,

vs.

LOS ANGELES COUNTY EMPLOYEES ASSOCIATION, LOCAL 660, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO; VICTOR N. HOCHEE, HARRY GLUCK, JACK ROBERTS, ANTHONY BUTKA, EUGENE MILLER, GARY SCHALANDER, BILLY MANNING, AND DOES 1 through 800,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came on regularly for trial on March 17, 18, 23, 24, 25, 26, 27, 30 and 31, 1981, and on April 1, 2, and 6, 1981, in Department 69 of the above-entitled Court, the Honorable Charles H. Older, Judge presiding. Musick, Peeler & Garrett; Larry A. Curtis, Stuart W. Rudnick, and Steven D. Weinstein appeared as attorneys for Plaintiff, and Geffner and Satzman, and Leo Geffner appeared as attorneys for Defendants.

During the course of the trial, the Court received oral and documentary evidence on behalf of all parties, and all parties filed post-trial briefs, which were fully considered by the Court. On April 27, 1981, the Court issued and served on the parties a Minute Order containing its Intended Decision for the Plaintiff and against certain of the Defendants. Defendants have submitted a timely request for Findings of Fact and Conclusions of Law, and pursuant to Rule 232, California Rules of Court, the Court now makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Defendant Los Angeles County Employees Association, Local 660, Service Employees International Union, AFL-CIO (hereinafter referred to as "Local 660" or the "Union"), is and has at all times material hereto been a California non-profit corporation and an employee organization having as one of its primary purposes the representation of Plaintiff's blue collar employees in their employment relations with Plaintiff.

2. At all times material to these proceedings, Defendant Victor N. Hochee was the General Manager of the Defendant Union. He reported directly to the Union's board of directors, and had the overall duty and right to control, direct, and manage all activities of the Defendant Union, including collective bargaining and strike activities. He did in fact exercise such managerial authority during the months of June and July, 1976; and he personally undertook actions that precipitated and maintained a strike by Plaintiff's blue collar employees between July 5, 1976, and July 18, 1976.

3. At all times material to these proceedings, Defendant Harry Gluck was an employee of the Defendant Union, and was in charge of all collective bargaining activities for the Defendant Union. He was the manager and supervisor of all of the Defendant Union's employed business agents during the months of June and July, 1976; and he personally exercised his managerial and supervisory authority to direct, manage, control and assign such business agents and others to undertake actions that caused and maintained a strike by Plaintiff's blue collar employees between July 5, 1976 and July 18, 1976.

4. At all times material to these proceedings, Defendant Anthony Butka was the Director of Research for the Defendant Union and Defendants Eugene Miller, Gary Schalander, Billy Manning, and Jack Roberts were employed by the Defendant Union as business agents. Each of them had been assigned by the Defendants Hochee and Gluck to activities having the intended effect of precipitating and maintaining a strike by Plaintiff's blue collar employees and during the months of June and July, 1976, Defendant Jack Roberts undertook actions that did precipitate a strike by Plaintiff's blue collar employees on July 5, 1976, and which actions further served to maintain and prolong such strike between July 5, 1976 and July 18, 1976.

5. Plaintiff County Sanitation District No. 2 of Los Angeles County is a public agency charged with the construction, maintenance and operation of sanitary land fill and sewage treatment facilities within the County of Los Angeles, pursuant to provisions of the California Health and Safety Code. Plaintiff also is signatory to a joint powers agreement with 26 other sanitation districts within the County of Los Angeles, which agreement vests Plaintiff

with the authority to employ all employees of the several districts, and to act on behalf of itself and the 26 other districts in personnel and labor relations matters, and in the maintenance of the present action.

6. In June and July, 1976, the Defendant Union and the Defendants Hochee, Gluck and Roberts, took actions which they knew or should have known would cause blue collar employees of Plaintiff to engage in a concerted work stoppage on and after July 5, 1976, and such actions did in fact proximately cause such a work stoppage.

7. The aforementioned work stoppage had the intended purpose of disabling Plaintiff from providing sanitary land fill and sewage treatment services for the benefit of approximately 4,000,000 citizens of the County of Los Angeles.

8. On July 6, 1976, a temporary restraining order was issued to enjoin each of the above-mentioned Defendants from the continuation of activities having the effect of causing and maintaining the aforementioned strike. Such Defendants were served with the temporary restraining order or otherwise had knowledge of its contents on or about July 6, 1976, and nevertheless willfully disobeyed such order between July 6, 1976 and July 18, 1976. Accordingly, equitable relief did not fully serve to provide a remedy for the harm suffered by Plaintiff as a result of the aforementioned actions of Defendants. In October, 1976, Defendant Union was adjudged guilty of three counts of contempt, and paid a fine of $1,500, as a result of violation of the aforementioned temporary restraining order. The payment of such fine did not in any manner serve to make Plaintiff whole for the harm suffered as a result of the aforementioned actions of Defendants.

9. At all times during the labor negotiations that preceded the July 5, 1976 strike, the Plaintiff and its authorized representatives met and conferred in good faith, and met promptly, upon request, for a reasonable number of times, and exchanged proposals and concessions in a good faith attempt to arrive at the terms of a negotiated Memorandum of Understanding, both prior to and after the July 5, 1976, inception of the aforementioned strike activities.

10. At the inception of the strike, and as more fully set forth below, Plaintiff undertook certain measures to enable it to continue providing essential sanitary land fill and sewage treatment services to approximately 4,000,000 residents of the County of Los Angeles. Each of the measures more fully set forth below was reasonable in the light of the strike situation that confronted the District between July 5, 1976 and July 18, 1976.

11. In order to assure the maintenance of essential public services during the aforementioned strike, Plaintiff assigned certain non-striking employees to work extended hours at various of its facilities, and compensated such employees at appropriate rates of overtime pay or compensatory time off for the extra hours served at such facilities during the strike. In this regard, the Plaintiff properly paid overtime compensation in the amount of $301,989; extra FICA payments in the amount of $2,238; and provided compensatory time off having a value of $16,040. Such amounts total $320,267, and, before the offsets more fully set forth below, represent an amount that Plaintiff was damaged as a direct and proximate result of the strike activities of Defendants as set forth above.

12. During the course of the strike, Plaintiff reasonably expended the amount of $55,080 to provide meals,

equipment rental, security guard services, and other expenses reasonably related to the maintenance of its sewage treatment and land fill operations. Such amounts would not have been expended but for the strike activities of Defendants as set forth above, and accordingly, Plaintiff was damaged in the amount of $55,080 as a direct and proximate result of such activities of Defendants.

13. Because it was not required to compensate employees who were on strike during the period July 5, 1976 until July 18, 1976, the Plaintiff saved $112,649 in unpaid salaries; $4,490 in FICA; and $8,312 in retirement. In addtion, the Plaintiff saved $8,992 that would have been paid to the striking employees as overtime if they had remained on the job. However, Plaintiff also voluntarily continued to pay health care benefits for the striking employees, at a cost of $6,000 during the course of the strike. Accordingly, Plaintiff's net savings as a result of the strike activities were $128,443.

14. The net monetary damage to Plaintiff as a direct and proximate result of the strike activities of Defendants as set forth above is $246,904.

15. On and after July 18, 1976, Plaintiff has lost the use of the sum of $246,904, and accordingly is entitled to prejudgment interest at the legal rate to compensate for the loss of such amount.

16. The Court judicially notices the pleadings and orders in *County Sanitation Districts No. 2 of Los Angeles County vs. Los Angeles County Employees Association, Local 660, SEIU, et al.*, Superior Court of the State of California for the County of Los Angeles, Case No. C 92480, June 26, 1974.

17. Each and every Conclusion of Law which may be properly a Finding of Fact is incorporated herein by reference as though fully set forth hereafter.

CONCLUSIONS OF LAW

From the foregoing Findings of Fact, the court makes the following Conclusions of Law:

1. The actions of the Defendant Union and Defendants Victor N. Hochee, Harry Gluck, and Jack Roberts in encouraging strike activities and the withholding of services by Plaintiff's employees; and in taking actions having the intent and the effect of precipitating such strike activities; and in taking actions for the purpose of maintaining such strike activities after their inception, were unlawful and were contrary to the public policy of the State of California.

2. The Defendants' unlawful activities in violation of the declared public policy of the State of California were the direct and proximate cause of the actions that Plaintiff was required to undertake to maintain essential public services, and Plaintiff's net additional cost of $246,904 constitutes the special damages suffered by Plaintiff as a direct and proximate result of the aforementioned tortious conduct of Defendants and each of them.

3. The issuance of temporary restraining order prohibiting Defendants' unlawful activities on and after July 6, 1976 did not serve to fully remedy or terminate the harm to Plaintiff, because of the Defendants' willful disobedience of such restraining order. Accordingly, the award of special damages in the net amount of $246,904 is necessary and appropriate under this Court's equitable jurisdiction to provide a remedy for the wrongs suffered by Plaintiff as a direct result of Defendants' willful and continued

disobedience of the aforementioned temporary restraining order.

4. The measures adopted by Plaintiff to continue the provision of essential public services during the aforementioned strike were at all times reasonable in light of the damages that would have been incurred by Plaintiff and by citizens of the County of Los Angeles served by Plaintiff if such actions had not been taken to avoid or minimize the loss threatened by Defendants' unlawful activities.

5. Defendants Victor N. Hochee, Harry Gluck, and Jack Roberts individually and collectively undertook actions on behalf of the Defendant Union that caused, precipitated, and maintained unlawful strike activities by Plaintiff's blue collar employees, and said Defendants are liable for their intentional misconduct.

6. At all relevant times, Plaintiff and its representatives met and conferred in good faith with Defendant Union and its representatives, and at no time was Plaintiff guilty of unclean hands.

7. At no relevant time have the employees of Plaintiff possessed any legal right to engage in a strike or in any other form of concerted activity involving a withholding, cessation, or slowing of the services for which such employees were retained.

8. Plaintiff is entitled to recover prejudgment interest at the legal rate on its special damages from and after the date of termination of the strike, on July 18, 1976.

9. Each and every Finding of Fact which may be properly a Conclusion of Law herein is incorporated by reference as though set forth in full hereat.

10. Let judgment be entered accordingly, with costs of suit to be awarded to Plaintiff.

DATE: 8/13/81

CHARLES H. OLDER
Judge of the Superior Court

SUPERIOR COURT
OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

CASE NO. 166 219

COUNTY SANITATION DISTRICT NO. 2 OF LOS ANGELES COUNTY, a public agency,

Plaintiff,

vs.

LOS ANGELES COUNTY EMPLOYEES ASSOCIATION, LOCAL 660, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO; VICTOR N. HOCHEE, HARRY GLUCK, JACK ROBERTS, ANTHONY BUTKA, EUGENE MILLER, GARY SCHALANDER, BILLY MANNING, AND DOES 1 through 800,

Defendants.

JUDGMENT

This matter came on regularly for trial on March 17, 18, 23, 24, 25, 26, 27, 30 and 31, 1981, and on April 1, 2, and 6, 1981, in Department 69 of the above-entitled Court, the Honorable Charles H. Older, Judge presiding. Musick, Peeler & Garrett, Larry A. Curtis, Stuart W. Rudnick, and Steven D. Weinstein appeared as attorneys for Plaintiff, and Geffner and Satzman, and Leo Geffner appeared as attorneys for Defendants. Evidence, both oral and documentary, having been presented by all parties, the cause having been argued and submitted for decision, and

the Court, on request of Defendants, having caused to be made and filed herein its written Findings of Fact and Conclusions of Law now makes the following judgment:

IT IS ORDERED, ADJUDGED AND DECREED that:

1. Plaintiff recover from Defendants Los Angeles County Employees Association, Local 660, Service Employees International Union, AFL-CIO; Victor N. Hochee; Harry Gluck; and Jack Roberts damages in the sum of $246,904, plus interest thereon at the rate of 7% per annum from July 18, 1976, together with Plaintiff's costs of suit to date in the sum of $87,615.22 as may be determined subsequent to entry of this Judgment, in the sum of $_____.

DATE: 8/31/81

CHARLES H. OLDER
Judge of the Superior Court

Judgment entered on _____, 19__ in the Judgment Book, Volume No. _____, Page _____.

_____ Clerk

By _____ Deputy

APPENDIX D

§ 1251. Congressional declaration of goals and policy

(a) The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter —

(1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;

(2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;

(3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited;

(4) it is the national policy that Federal financial assistance be provided to construct publicly owned waste treatment works;

(5) it is the national policy that areawide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State; and

(6) it is the national policy that a major research and demonstration effort be made to develop technology necessary to eliminate the discharge of pollutants into the navigable waters, waters of the contiguous zone, and the oceans.

(b) It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter. It is the policy of Congress that the States manage the construction grant program under this chapter and implement the permit programs under sections 1342 and 1344 of this title. It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution, and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.

(c) It is further the policy of Congress that the President, acting through the Secretary of State and such national and international organizations as he determines appropriate, shall take such action as may be necessary to insure that to the fullest extent possible all foreign countries shall take meaningful action for the prevention, reduction, and elimination of pollution in their waters and in international waters and for the achievement of goals regarding the elimination of discharge of pollutants and the improvement of water quality to at least the same extent as the United States does under its laws.

(d) Except as otherwise expressly provided in this chapter, the Administrator of the Environmental Protection Agency (hereinafter in this chapter called "Administrator") shall administer this chapter.

(e) Public participation in the development, revision, and enforcement of any regulation, standard, effluent

limitation, plan, or program established by the Administrator or any State under this chapter shall be provided for, encouraged, and assisted by the Administrator and the States. The Administrator, in cooperation with the States, shall develop and publish regulations specifying minimum guidelines for public participation in such processes.

(f) It is the national policy that to the maximum extent possible the procedures utilized for implementing this chapter shall encourage the drastic minimization of paperwork and interagency decision procedures, and the best use of available manpower and funds, so as to prevent needless duplication and unnecessary delays at all levels of government.

(g) It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this Act. It is the further policy of Congress that nothing in this Act shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall cooperate with State and local agencies to develop comprehensive solutions to prevent, reduce, and eliminate pollution in concert with programs for managing water resources.

§ 1319. Enforcement

State enforcement; compliance orders

(a) (1) Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any condition or limitation which implements section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title in a permit issued by a State under an approved permit

program under section 1342 or 1344 of this title, he shall proceed under his authority in paragraph (3) of this subsection or he shall notify the person in alleged violation and such State of such finding. If beyond the thirtieth day after the Administrator's notification the State has not commenced appropriate enforcement action, the Administrator shall issue an order requiring such person to comply with such condition or limitation or shall bring a civil action in accordance with subsection (b) of this section.

(2) Whenever, on the basis of information available to him, the Administrator finds that violations of permit conditions or limitations as set forth in paragraph (1) of this subsection are so widespread that such violations appear to result from a failure of the State to enforce such permit conditions or limitations effectively, he shall so notify the State. If the Administrator finds such failure extends beyond the thirtieth day after such notice, he shall give public notice of such finding. During the period beginning with such public notice and ending when such State satisfies the Administrator that it will enforce such conditions and limitations (hereafter referred to in this section as the period of "federally assumed enforcement"), except where an extension has been granted under paragraph (5)(B) of this subsection, the Administrator shall enforce any permit condition or limitation with respect to any person —

(A) by issuing an order to comply with such condition or limitation, or

(B) by bringing a civil action under subsection (b) of this section.

(3) Whenever on the basis of any information available to him the Administrator finds that any person is in violation of section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or is in violation of any permit condition

or limitation implementing any of such sections in a permit issued under section 1342 of this title by him or by a State or in a permit issued under section 1344 of this title by a State, he shall issue an order requiring such person to comply with such section or requirement, or he shall bring a civil action in accordance with subsection (b) of this section.

(4) A copy of any order issued under this subsection shall be sent immediately by the Administrator to the State in which the violation occurs and other affected States. In any case in which an order under this subsection (or notice to a violator under paragraph (1) of this subsection) is issued to a corporation, a copy of such order (or notice) shall be served on any appropriate corporate officers. An order issued under this subsection relating to a violation of section 1318 of this title shall not take effect until the person to whom it is issued has had an opportunity to confer with the Administrator concerning the alleged violation.

(5) (A) Any order issued under this subsection shall be by personal service, shall state with reasonable specificity the nature of the violation, and shall specify a time for compliance not to exceed thirty days in the case of a violation of an interim compliance schedule or operation and maintenance requirement and not to exceed a time the Administrator determines to be reasonable in the case of a violation of a final deadline, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements.

(B) The Administrator may, if he determines (i) that any person who is a violator of, or any person who is otherwise not in compliance with, the time requirements under this chapter or in any permit issued under this chapter, has acted in good faith, and has made a commitment (in the

form of contracts or other securities) of necessary resources to achieve compliance by the earliest possible date after July 1, 1977, but not later than April 1, 1979; (ii) that any extension under this provision will not result in the imposition of any additional controls on any other point or nonpoint source; (iii) that an application for a permit under section 1342 of this title was filed for such person prior to December 31, 1974; and (iv) that the facilities necessary for compliance with such requirements are under construction, grant an extension of the date referred to in section 1311(b)(1)(A) of this title to a date which will achieve compliance at the earliest time possible but not later than April 1, 1979.

(6) Whenever, on the basis of information available to him, the Administrator finds (A) that any person is in violation of section 1311(b)(1)(A) or (C) of this title, (B) that such person cannot meet the requirements for a time extension under section 1311(i)(2) of this title, and (C) that the most expeditious and appropriate means of compliance with this chapter by such person is to discharge into a publicly owned treatment works, then, upon request of such person, the Administrator may issue an order requiring such person to comply with this chapter at the earliest date practicable, but not later than July 1, 1983, by discharging into a publicly owned treatment works if such works concur with such order. Such order shall include a schedule of compliance.

Civil actions

(b) The Administrator is authorized to commence a civil action for appropriate relief, including a permanent or

temporary injunction, for any violation for which he is authorized to issue a compliance order under subsection (a) of this section. Any action under this subsection may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance. Notice of the commencement of such action shall be given immediately to the appropriate State.

Criminal penalties

(c) (1) Any person who willfully or negligently violates section 1311, 1312, 1316, 1317, or 1318 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State or in a permit issued under section 1344 of this title by a State, shall be punished by a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than one year, or by both. If the conviction is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $50,000 per day of violation, or by imprisonment for not more than two years, or by both.

(2) Any person who knowingly makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under this chapter or who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required to be maintained under this chapter, shall upon conviction, be punished by a fine of not more than $10,000, or by

imprisonment for not more than six months, or by both.

(3) For the purposes of this subsection, the term "person" shall mean, in addition to the definition contained in section 1362(5) of this title, any responsible corporate officer.

Civil penalties

(d) Any person who violates section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator, or by a State, or in a permit issued under section 1344 of this title by a State, and any person who violates any order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty not to exceed $10,000 per day of such violation.

State liability for judgments and expenses

(e) Whenever a municipality is a party to a civil action brought by the United States under this section, the State in which such municipality is located shall be joined as a party. Such State shall be liable for payment of any judgment, or any expenses incurred as a result of complying with any judgment, entered against the municipality in such action to the extent that the laws of that State prevent the municipality from raising revenues needed to comply with such judgment.

Wrongful introduction of pollutants into treatment works

(f) Whenever, on the basis of any information available to him, the Administrator finds that an owner or operator of any source is introducing a pollutant into a treatment works in violation of subsection (d) of section 1317 of this title, the Administrator may notify the owner or operator of such treatment works and the State of such violation. If the owner or operator of the treatment works does not commence appropriate enforcement action within 30 days of the date of such notification, the Administrator may commence a civil action for appropriate relief, including but not limited to, a permanent or temporary injunction, against the owner or operator of such treatment works. In any such civil action the Administrator shall join the owner or operator of such source as a party to the action. Such action shall be brought in the district court of the United States in the district in which the treatment works is located. Such court shall have jurisdiction to restrain such violation and to require the owner or operator of the treatment works and the owner or operator of the source to take such action as may be necessary to come into compliance with this chapter. Notice of commencement of any such action shall be given to the State. Nothing in this subsection shall be construed to limit or prohibit any other authority the Administrator may have under this chapter.

June 30, 1948, c. 758, Title III, § 309, as added Oct. 18, 1972, Pub.L. 92-500, § 2, 86 Stat. 859, and amended Dec. 27, 1977, Pub.L. 95-217, §§ 54(b), 55,56,67(c)(2), 92 Stat. 1591, 1592, 1606.

§ 1321. Oil and hazardous substance liability

(a) Definitions

For the purpose of this section, the term —

(1) "oil" means oil of any kind or in any form, including, but not limited to, petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil;

(2) "discharge" includes, but is not limited to, any spilling, leaking, pumping, pouring, emitting, emptying or dumping, but excludes (A) discharges in compliance with a permit under section 1342 of this title, (B) discharges resulting from circumstances identified and reviewed and made a part of the public record with respect to a permit issued or modified under section 1342 of this title, and subject to a condition in such permit, and (C) continuous or anticipated intermittent discharges from a point source, identified in a permit or permit application under section 1342 of this title, which are caused by events occurring within the scope of relevant operating or treatment systems;

(3) "vessel" means every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water other than a public vessel;

(4) "public vessel" means a vessel owned or bareboat-chartered and operated by the United States, or by a State or political subdivision thereof, or by a foreign nation, except when such vessel is engaged in commerce;

(5) "United States" means the States, the District of Columbia, the Commonwealth of Puerto Rico, the Canal Zone, Guam, American Samoa, the Virgin Islands, and the Trust Territory of the Pacific Islands;

(6) "owner or operator" means (A) in the case of a vessel, any person owning, operating, or chartering by demise, such vessel, and (B) in the case of an onshore facility, and an offshore facility, any person owning or operating such onshore facility or offshore facility, and (C) in the case of any abandoned offshore facility, the person who owned or operated such facility immediately prior to such abandonment;

(7) "person" includes an individual, firm, corporation, association, and a partnership;

(8) "remove" or "removal" refers to removal of the oil or hazardous substances from the water and shorelines or the taking of such other actions as may be necessary to minimize or mitigate damage to the public health or welfare, including, but not limited to, fish, shellfish, wildlife, and public and private property, shorelines, and beaches;

(9) "contiguous zone" means the entire zone established or to be established by the United States under article 24 of the Convention on the Territorial Sea and the Contiguous Zone;

(10) "onshore facility" means any facility (including, but not limited to, motor vehicles and rolling stock) of any kind located in, on, or under, any land within the United States other than submerged land;

(11) "offshore facility" means any facility of any kind located in, on, or under, any of the navigable waters of the United States, and any facility of any kind which is subject to the jurisdiction of the United States and is located in, on, or under any other waters, other than a vessel or a public vessel;

(12) "act of God" means an act occasioned by an unanticipated grave natural disaster;

(13) "barrel" means 42 United States gallons at 60 degrees Fahrenheit;

(14) "hazardous substance" means any substance designated pursuant to subsection (b)(2) of this section;

(15) "inland oil barge" means a non-self-propelled vessel carrying oil in bulk as cargo and certificated to operate only in the inland waters of the United States, while operating in such waters;

(16) "inland waters of the United States" means those waters of the United States lying inside the baseline from which the territorial sea is measured and those waters outside such baseline which are a part of the Gulf Intracoastal Waterway.

(17) "Otherwise subject to the jurisdiction of the United States" means subject to the jurisdiction of the United States by virtue of United States citizenship, United States vessel documentation or numbering, or as provided for by international agreement to which the United States is a party.

(b) Congressional declaration of policy against discharges of oil or hazardous substances; study of higher standard of care incentives and report to Congress; liability; penalties; civil actions: penalty limitations, separate offenses, jurisdiction, mitigation of damages and costs, recovery of removal costs and alternative remedies

(1) The Congress hereby declares that it is the policy of the United States that there should be no discharges of oil or hazardous substances into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone, or in connection with activities under the Outer Continental Shelf Lands Act or the Deepwater Port Act of 1974, or which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States (including resources under the Magnasan Fishery Conservation and Management Act).

(2) (A) The Administrator shall develop, promulgate, and revise as may be appropriate, regulations designating as hazardous substances, other than oil as defined in this section, such elements and compounds which, when discharged in any quantity into or upon the navigable waters of the United States or adjoining shorelines or the waters of the contiguous zone or in connection with activities under the Outer Continental Shelf Lands Act or the Deepwater Port Act of 1974, or which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States (including resources under the Magnasan Fishery Conservation and Management Act), present an imminent and substantial danger to the public health or welfare, including,

but not limited to, fish, shellfish, wildlife, shorelines, and beaches.

(B) The Administrator shall within 18 months after the date of enactment of this paragraph, conduct a study and report to the Congress on methods, mechanisms, and procedures to create incentives to achieve a higher standard of care in all aspects of the management and movement of hazardous substances on the part of owners, operators, or persons in charge of onshore facilities, offshore facilities, or vessels. The Administrator shall include in such study (1) limits of liability, (2) liability for third party damages, (3) penalties and fees, (4) spill prevention plans, (5) current practices in the insurance and banking industries, and (6) whether the penalty enacted in subclause (bb) of clause (iii) of subparagraph (B) of subsection (b)(2) of section 311 of Public Law 92-500 should be enacted.

(3) The discharge of oil or hazardous substances (i) into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone, or (ii) in connection with activities under the Outer Continental Shelf Lands Act or the Deepwater Port Act of 1974, or which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States (including resources under the Magnason Fishery Conservation and Management Act), in harmful quantities as determined by the President under paragraph (4) of this subsection, is prohibited, except (A) in the case of such discharges of oil into the waters of the contiguous zone or which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States (including resources under the Fishery Conservation and Management Act of 1976), where permitted under the International

Convention for the Prevention of Pollution of the Sea by Oil, 1954, as amended, and (B) where permitted in quantities and at times and locations or under such circumstances or conditions as the President may, by regulation, determine not to be harmful. Any regulations issued under this subsection shall be consistent with maritime safety and with marine and navigation laws and regulations and applicable water quality standards.

(4) The President shall by regulation determine for the purposes of this section, those quantities of oil and any hazardous substance the discharge of which may be harmful to the public health or welfare of the United States, including, but not limited to, fish, shellfish, wildlife, and public and private property, shorelines, and beaches.

(5) Any person in charge of a vessel or of an onshore facility or an offshore facility shall, as soon as he has knowledge of any discharge of oil or a hazardous substance from such vessel or facility in violation of paragraph (3) of this subsection, immediately notify the appropriate agency of the United States Government of such discharge. Any such person (A) in charge of a vessel from which oil or a hazardous substance is discharge in violation of paragraph (3)(i) of this subsection, or (B) in charge of a vessel from which oil or a hazardous substance is discharged in violation of paragraph (3)(ii) of this subsection and who is otherwise subject to the jurisdiction of the United States, or (C) in charge of an onshore facility or an offshore facility, who fails to notify immediately such agency of such discharge shall, upon conviction, be fined not more than $10,000, or imprisoned for not more than one year, or both. Notification received pursuant to this paragraph or information obtained by the exploitation of such notification shall not be used against any such person

in any criminal case, except a prosecution for perjury or for giving a false statement.

(6)(A) Any owner, operator, or person in charge of any onshore facility or offshore facility from which oil or a hazardous substance is discharged in violation of paragraph (3) of this subsection shall be assessed a civil penalty by the Secretary of the department in which the Coast Guard is operating of not more than $5,000 for each offense. Any owner, operator, or person in charge of any vessel from which oil or a hazardous substance is discharged in violation of paragraph (3)(i) of this subsection, and any owner, operator, or person in charge of a vessel from which oil or a hazardous substance is discharged in violation of paragraph (3)(ii) who is otherwise subject to the jurisdiction of the United States, shall be assessed a civil penalty by the Secretary of the department in which the Coast Guard is operating of not more than $5,000 for each offense. No penalty shall be assessed unless the owner or operator charged shall have been given notice and opportunity for a hearing on such charge. Each violation is a separate offense. Any such civil penalty may be compromised by such Secretary. In determining the amount of the penalty, or the amount agreed upon in compromise, the appropriateness of such penalty to the size of the business of the owner or operator charged, the effect on the owner or operator's ability to continue in business, and the gravity of the violation, shall be considered by such Secretary. The Secretary of the Treasury shall withhold at the request of such Secretary the clearance required by section 91 of Title 46 of any vessel the owner or operator of which is subject to the foregoing penalty. Clearance may be granted in such cases upon the filing of a bond or other surety satisfactory to such Secretary.

(B) The Administrator, taking into account the gravity of the offense, and the standard of care manifested by the owner, operator, or person in charge, may commence a civil action against any such person subject to the penalty under subparagraph (A) of this paragraph to impose a penalty based on consideration of the size of the business of the owner or operator, the effect on the ability of the owner or operator to continue in business, the gravity of the violation, and the nature, extent, and degree of success of any efforts made by the owner, operator, or person in charge to minimize or mitigate the effects of such discharge. The amount of such penalty shall not exceed $50,000, except that where the United States can show that such discharge was the result of willful negligence or willful misconduct within the privity and knowledge of the owner, operator, or person in charge, such penalty shall not exceed $250,000. Each violation is a separate offense. Any action under this subparagraph may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to assess such penalty. No action may be commenced under this clause where a penalty has been assessed under clause (A) of this paragraph.

(C) In addition to establishing a penalty for the discharge of a hazardous substance, the Administrator may act to mitigate the damage to the public health or welfare caused by such discharge. The cost of such mitigation shall be deemed a cost incurred under subsection (c) of this section for the removal of such substance by the United States Government.

(D) Any costs of removal incurred in connection with a discharge excluded by subsection (a)(2)(C) of this section shall be recoverable from the owner or operator of the

source of the discharge in an action brought under section 1319(b) of this title.

(E) Civil penalties shall not be assessed under both this section and section 1319 of this title for the same discharge.

(c) Removal of discharged oil or hazardous substances; National Contingency Plan

(1) Whenever any oil or a hazardous substance is discharged, or there is a substantial threat of such discharge, into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone, or in connection with activities under the Outer Continental Shelf Lands Act or the Deepwater Port Act of 1974, or which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States (including resources under the Magnasan Fishery Conservation and Management Act) the President is authorized to act to remove or arrange for the removal of such oil or substance at any time, unless he determines such removal will be done properly by the owner or operator of the vessel, onshore facility, or offshore facility from which the discharge occurs.

(2) Within sixty days after October 18, 1972, the President shall prepare and publish a National Contingency Plan for removal of oil and hazardous substances, pursuant to this subsection. Such National Contingency Plan shall provide for efficient, coordinated, and effective action to minimize damage from oil and hazardous substance discharges, including containment, dispersal, and removal of oil and hazardous substances, and shall include, but not be limited to —

(A) assignment of duties and responsibilities among Federal departments and agencies in coordination with State and local agencies, including, but not limited to, water pollution control, conservation, and port authorities;

(B) identification, procurement, maintenance, and storage of equipment and supplies;

(C) establishment or designation of a strike force consisting of personnel who shall be trained, prepared, and available to provide necessary services to carry out the Plan, including the establishment at major ports, to be determined by the President, of emergency task forces of trained personnel, adequate oil and hazardous substance pollution control equipment and material, and a detailed oil and hazardous substance pollution prevention and removal plan;

(D) a system of surveillance and notice designed to insure earliest possible notice of discharges of oil and hazardous substances and imminent threats of such discharges to the appropriate State and Federal agencies;

(E) establishment of a national center to provide coordination and direction for operations in carrying out the Plan;

(F) procedures and techniques to be employed in identifying, containing, dispersing, and removing oil and hazardous substances;

(G) a schedule, prepared in cooperation with the States, identifying (i) dispersants and other chemicals, if any, that may be used in carrying out the Plan, (ii) the waters in which such dispersants and chemicals may be used, and (iii) the quantities

of such dispersant or chemical which can be used safely in such waters, which schedule shall provide in the case of any dispersant, chemical, or waters not specifically identified in such schedule that the President, or his delegate, may, on a case-by-case basis, identify the dispersants and other chemicals which may be used, the waters in which they may be used, and the quantities which can be used safely in such waters; and

(H) a system whereby the State or States affected by a discharge of oil or hazardous substance may act where necessary to remove such discharge and such State or States may be reimbursed from the fund established under subsection (k) of this section for the reasonable costs incurred in such removal.

The President may, from time to time, as he deems advisable revise or otherwise amend the National Contingency Plan. After publication of the National Contingency Plan, the removal of oil and hazardous substances and actions to minimize damage from oil and hazardous substance discharges shall, to the greatest extent possible, be in accordance with the National Contingency Plan.

(d) Maritime disaster discharges

Whenever a marine disaster in or upon the navigable waters of the United States has created a substantial threat of a pollution hazard to the public health or welfare of the United States, including, but not limited to, fish, shellfish, and wildlife and the public and private shorelines and beaches of the United States, because of a discharge, or an imminent discharge, of large quantities of oil, or of a

hazardous substance from a vessel the United States may (A) coordinate and direct all public and private efforts directed at the removal or elimination of such threat; and (B) summarily remove, and, if necessary, destroy such vessel by whatever means are available without regard to any provisions of law governing the employment of personnel or the expenditure of appropriate funds. Any expense incurred under this subsection or under the Intervention on the High Seas Act (or the convention defined in section 2(3) thereof) shall be a cost incurred by the United States Government for the purposes of subsection (f) of this section in the removal of oil or hazardous substance.

(e) Judicial relief

In addition to any other action taken by a State or local government, when the President determines there is an imminent and substantial threat to the public health or welfare of the United States, including, but not limited to, fish, shellfish, and wildlife and public and private property, shorelines, and beaches within the United States, because of an actual or threatened discharge of oil or hazardous substance into or upon the navigable waters of the United States from an onshore or offshore facility, the President may require the United States attorney of the district in which the threat occurs to secure such relief as may be necessary to abate such threat, and the district courts of the United States shall have jurisdiction to grant such relief as the public interest and the equities of the case may require.

(f) Liability for actual costs of removal

(1) Except where an owner or operator can prove that a discharge was caused solely by (A) an act of God, (B) an act of war, (c) negligence on the part of the United States Government, or (D) any act or omission of a third party without regard to whether any such act or omission was or was not negligent, or any combination of the foregoing clauses, such owner or operator of any vessel from which oil or a hazardous substance is discharged in violation of subsection (b)(3) of this section shall, notwithstanding any other provision of law, be liable to the United States Government for the actual costs incurred under subsection (c) of this section for the removal of such oil or substance by the United States Government in an amount not to exceed, in the case of an inland oil barge $125 per gross ton of such barge, or $125,000, whichever is greater, and in the case of any other vessel, $150 per gross ton of such vessel (or, for a vessel carrying oil or hazardous substances as cargo, $250,000), whichever is greater, except that where the United States can show that such discharge was the result of willful negligence or willful misconduct within the privity and knowledge of the owner, such owner or operator shall be liable to the United States Government for the full amount of such costs. Such costs shall constitute a maritime lien on such vessel which may be recovered in an action in rem in the district court of the United States for any district within which any vessel may be found. The United States may also bring an action against the owner or operator of such vessel in any court of competent jurisdiction to recover such costs.

(2) Except where an owner or operator of an onshore facility can prove that a discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the

part of the United States Government, or (D) an act or omission of a third party without regard to whether any such act or omission was or was not negligent, or any combination of the foregoing clauses, such owner or operator of any such facility from which oil or a hazardous substance is discharged in violation of subsection (b)(3) of this section shall be liable to the United States Government for the actual costs incurred under subsection (c) of this section for the removal of such oil or substance by the United States Government in an amount not to exceed $50,000,000 except that where the United States can show that such discharge was the result of willful negligence or willful misconduct within the privity and knowledge of the owner, such owner or operator shall be liable to the United States Government for the full amount of such costs. The United States may bring an action against the owner or operator of such facility in any court of competent jurisdiction to recover such costs. The Administrator is authorized, by regulation, after consultation with the Secretary of Commerce and the Small Business Administration, to establish reasonable and equitable classifications of those onshore facilities having a total fixed storage capacity of 1,000 barrels or less which he determines because of size, type, and location do not present a substantial risk of the discharge of oil or a hazardous substance in violation of subsection (b)(3) of this section, and apply with respect to such classifications differing limits of liability which may be less than the amount contained in this paragraph.

(3) Except where an owner or operator of an offshore facility can prove that a discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of a third party without regard to whether any

such act or omission was or was not negligent, or any combination of the foregoing clauses, such owner or operator of any such facility from which oil or a hazardous substance in discharge in violation of subsection (b)(3) of this section shall, notwithstanding any other provision of law, be liable to the United States Government for the actual costs incurred under subsection (c) of this section for the removal of such oil or substance by the United States Government in an amount not to exceed $50,000,000, except that where the United States can show that such discharge was the result of willful negligence or willful misconduct within the privity and knowledge of the owner, such owner or operator shall be liable to the United States Government for the full amount of such costs. The United States may bring an action against the owner or operator of such a facility in any court of competent jurisdiction to recover such costs.

(4) The costs of removal of oil or a hazardous substance for which the owner or operator of a vessel or onshore or offshore facility is liable under subsection (f) of this section shall include any costs or expenses incurred by the Federal Government or any State government in the restoration or replacement of natural resources damaged or destroyed as a result of a discharge of oil or a hazardous substance in violation of subsection (b) of this section.

(5) The President, or the authorized representative of any State, shall act on behalf of the public as trustee of the natural resources to recover for the costs of replacing or restoring such resources. Sums recovered shall be used to restore, rehabilitate, or acquire the equivalent of such natural resources by the appropriate agencies of the Federal Government, or the State government.

(g) Third party liability

Where the owner or operator of a vessel (other than an inland oil barge) carrying oil or hazardous substances as cargo or an onshore or offshore facility which handles or stores oil or hazardous substances in bulk, from which oil or a hazardous substance is discharged in violation of subsection (b) of this section, alleges that such discharge was caused solely by an act or omission of a third party, such owner or operator shall pay to the United States Government the actual costs incurred under subsection (c) of this section for removal of such oil or substance and shall be entitled by subrogation to all rights of the United States Government to recover such costs from such third party under this subsection. In any case where an owner or operator of a vessel, of an onshore facility, or of an offshore facility, from which oil or a hazardous substance is discharged in violation of subsection (b)(3) of this section, proves that such discharge of oil or hazardous substance was caused solely by an act or omission of a third party, or was caused solely by such an act or omission in combination with an act of God, an act of war, or negligence on the part of the United States Government, such third party shall, notwithstanding any other provision of law, be liable to the United States Government for the actual costs incurred under subsection (c) of this section for removal of such oil or substance by the United States Government, except where such third party can prove that such discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of another party without regard to whether such act or omission was or was not negligent or any combination of the foregoing clauses. If such third party was the owner or operator of a vessel

which caused the discharge of oil or a hazardous substance in violation of subsection (b)(3) of this section, the liability of such third party under this subsection shall not exceed, in the case of an inland oil barge $125 per gross ton of such barge, or $125,000, whichever is greater, and in the case of any other vessel, $150 per gross ton of such vessel (or, for a vessel carrying oil or hazardous substances as cargo, $250,000), whichever is greater. In any other case the liability of such third party shall not exceed the limitation which would have been applicable to the owner or operator of the vessel or the onshore or offshore facility from which the discharge actually occurred if such owner or operator were liable. If the United States can show that the discharge of oil or a hazardous substance in violation of subsection (b)(3) of this section was the result of willful negligence or willful misconduct within the privity and knowledge of such third party, such third party shall be liable to the United States Government for the full amount of such removal costs. The United States may bring an action against the third party in any court of competent jurisdiction to recover such removal costs.

(h) Rights against third parties who caused or contributed to discharge

The liabilities established by this section shall in no way affect any rights which (1) the owner or operator of a vessel or of an onshore facility or an offshore facility may have against any third party whose acts may in any way have caused or contributed to such discharge, or (2) the United States Government may have against any third party whose actions may in any way have caused or contributed to the discharge of oil or hazardous substance.

(i) Recovery of removal costs

(1) In any case where an owner or operator of a vessel or an onshore facility or an offshore facility from which oil or a hazardous substance is discharged in violation of subsection (b)(3) of this section acts to remove such oil or substance in accordance with regulations promulgated pursuant to this section, such owner or operator shall be entitled to recover the reasonable costs incurred in such removal upon establishing, in a suit which may be brought against the United States Government in the United States Claims Court, that such discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of a third party without regard to whether such act or omission was or was not negligent, or of any combination of the foregoing causes.

(2) The provisions of this subsection shall not apply in any case where liability is established pursuant to the Outer Continental Shelf Lands Act, or the Deepwater Port Act of 1974.

(3) Any amount paid in accordance with a judgment of the United States Claims Court pursuant to this section shall be paid from the funds established pursuant to subsection (k) of this section.

(j) Regulations; penalty

(1) Consistent with the National Contingency Plan required by subsection (c)(2) of this section, as soon as practicable after October 18, 1972, and from time to time thereafter, the President shall issue regulations consistent with maritime safety and with marine and navigation laws

(A) establishing methods and procedures for removal of discharged oil and hazardous substances, (B) establishing criteria for the development and implementation of local and regional oil and hazardous substance removal contingency plans, (C) establishing procedures, methods, and equipment and other requirements for equipment to prevent discharges of oil and hazardous substances from vessels and from onshore facilities and offshore facilities, and to contain such discharges, and (D) governing the inspection of vessels carrying cargoes of oil and hazardous substances and the inspection of such cargoes in order to reduce the likelihood of discharges of oil from vessels in violation of this section.

(2) Any owner or operator of a vessel or an onshore facility or an offshore facility and any other person subject to any regulation issued under paragraph (1) of this subsection who fails or refuses to comply with the provisions of any such regulations, shall be liable to a civil penalty of not more than $5,000 for each such violation. This paragraph shall not apply to any owner or operator of any vessel from which oil or a hazardous substance is discharged in violation of paragraph (3)(ii) of subsection (b) of this section unless such owner, operator, or person in charge is otherwise subject to the jurisdiction of the United States. Each violation shall be a separate offense. The President may assess and compromise such penalty. No penalty shall be assessed until the owner, operator, or other person charged shall have been given notice and an opportunity for a hearing on such charge. In determining the amount of the penalty, or the amount agreed upon in compromise, the gravity of the violation, and the demonstrated good faith of the owner, operator, or other person charged in attempting to achieve rapid compliance,

after notification of a violation, shall be considered by the President.

(k) Authorization of appropriations

(1) There is hereby authorized to be appropriated to a revolving fund to be established in the Treasury such sums as may be necessary to maintain such fund at a level of $35,000,000 to carry out the provisions of subsections (c), (d), (i), and (l) of this section. Any other funds received by the United States under this section shall also be deposited in said fund for such purposes. All sums appropriated to, or deposited in, said fund shall remain available until expended.

(2) The Secretary of Transportation shall notify the Congress whenever the unobligated balance of the fund is less than $12,000,000, and shall include in such notification a recommendation for a supplemental appropriation relating to the sums that are needed to maintain the fund at the level provided in paragraph (1).

(l) Administration

The President is authorized to delegate the administration of this section to the heads of those Federal departments, agencies, and instrumentalities which he determines to be appropriate. Any moneys in the fund established by subsection (k) of this section shall be available to such Federal departments, agencies, and instrumentalities to carry out the provisions of subsections (c) and (i) of this section. Each such department, agency, and instrumentality, in order to avoid duplication of effort, shall whenever appropriate, utilize the

personnel, services, and facilities of other Federal departments, agencies, and instrumentalities.

(m) Boarding and inspection of vessels; arrest; execution of warrants or other process

Anyone authorized by the President to enforce the provisions of this section may, except as to public vessels, (A) board and inspect any vessel upon the navigable waters of the United States or the waters of the contiguous zone, (B) with or without a warrant arrest any person who violates the provisions of this section or any regulation issued thereunder in his presence or view, and (C) execute any warrant or other process issued by an officer or court of competent jurisdiction.

(n) Jurisdiction

The several district courts of the United States are invested with jurisdiction for any actions, other than actions pursuant to subsection (i)(1) of this section, arising under this section. In the case of Guam and the Trust Territory of the Pacific Islands, such actions may be brought in the district court of Guam, and in the case of the Virgin Islands such actions may be brought in the district court of the Virgin Islands. In the case of American Samoa and the Trust Territory of the Pacific Islands, such actions may be brought in the District Court of the United States for the District of Hawaii and such court shall have jurisdiction of such actions. In the case of the Canal Zone, such actions may be brought in the United States District Court for the District of the Canal Zone.

(o) Obligation for damages unaffected; local authority not preempted; existing Federal authority not modified or affected

(1) Nothing in this section shall affect or modify in any way the obligations of any owner or operator of any vessel, or of any owner or operator of any onshore facility or offshore facility to any person or agency under any provision of law for damages to any publicly owned or privately owned property resulting from a discharge of any oil or hazardous substance or from the removal of any such oil or hazardous substance.

(2) Nothing in this section shall be construed as preempting any State or political subdivision thereof from imposing any requirement or liability with respect to the discharge of oil or hazardous substance into any waters within such State.

(3) Nothing in this section shall be construed as affecting or modifying any other existing authority of any Federal department, agency, or instrumentality, relative to onshore or offshore facilities under this chapter or any other provision of law, or to affect any State or local law not in conflict with this section.

(p) Financial responsibility

(1) Any vessel over three hundred gross tons, including any barge of equivalent size, but not including any barge that is not self-propelled and that does not carry oil or hazardous substances as cargo or fuel, using any port or place in the United States or the navigable waters of the United States for any purpose shall establish and maintain under regulations to be prescribed from time to time by the

President, evidence of financial responsibility of, in the case of an inland oil barge $125 per gross ton of such barge, or $125,000, whichever is greater, and in the case of any other vessel, $150 per gross ton of such vessel (or, for a vessel carrying oil or hazardous substances as cargo, $250,000), whichever is greater, to meet the liability to the United States which such vessel could be subjected under this section. In cases where an owner or operator owns, operates, or charters more than one such vessel, financial responsibility need only be established to meet the maximum liability to which the largest of such vessels could be subjected. Financial responsibility may be established by any one of, or a combination of, the following methods acceptable to the President: (A) evidence of insurance, (B) surety bonds, (C) qualification as a self-insurer, or (D) other evidence of financial responsibility. Any bond filed shall be issued by a bonding company authorized to do business in the United States.

(2) The provisions of paragraph (1) of this subsection shall be effective April 3, 1971, with respect to oil and one year after October 18, 1972, with respect to hazardous substances. The President shall delegate the responsibility to carry out the provisions of this subsection to the appropriate agency head within sixty days after October 18, 1972. Regulations necessary to implement this subsection shall be issued within six months after October 18, 1972.

(3) Any claim for costs incurred by such vessel may be brought directly against the insurer or any other person providing evidence of financial responsibility as required under this subsection. In the case of any action pursuant to this subsection such insurer or other person shall be entitled to invoke all rights and defenses which would have been available to the owner or operator if an action had been

brought against him by the claimant, and which would have been available to him if an action had been brought against him by the owner or operator.

(4) Any owner or operator of a vessel subject to this subsection, who fails to comply with the provisions of this subsection or any regulation issued thereunder, shall be subject to a fine of not more than $10,000.

(5) The Secretary of the Treasury may refuse the clearance required by section 91 of Title 46 to any vessel subject to this subsection, which does not have evidence furnished by the President that the financial responsibility provisions of paragraph (1) of this subsection have been complied with.

(6) The Secretary of the Department in which the Coast Guard is operated may (A) deny entry to any port or place in the United States or the navigable waters of the United States, to, and (B) detain at the port or place in the United States from which it is about to depart for any other port or place in the United States, any vessel subject to this subsection, which upon request, does not produce evidence furnished by the President that the financial responsibility provisions of paragraph (1) of this subsection have been complied with.

(q) Establishment of maximum limit of liability with respect to onshore or offshore facilities

The President is authorized to establish, with respect to any class or category of onshore or offshore facilities, a maximum limit of liability under subsections (f)(2) and (3) of this section of less than $50,000,000, but not less than $8,000,000.

(r) Liability limitations not to limit liability under other legislation

Nothing in this section shall be construed to impose, or authorize the imposition of, any limitation on liability under the Outer Continental Shelf Lands Act or the Deepwater Port Act of 1974.

June 30, 1948, c. 758, Title III, § 311, as added Oct. 18, 1972, Pub.L. 92-500, § 2, 86 Stat. 862, and amended Dec. 28, 1973, Pub.L. 93-207, § 1(4), 87 Stat. 906; Dec. 27, 1977, Pub.L. 95-217, §§ 57, 58(a)-(g), (i), (k)-(m), 91 Stat. 1593-1596.

APPENDIX E

§ 6902. Objectives

The objectives of this chapter are to promote the protection of health and the environment and to conserve valuable material and energy resources by —

(1) providing technical and financial assistance to State and local governments and interstate agencies for the development of solid waste management plans (including resource recovery and resource conservation systems) which will promote improved solid waste management techniques (including more effective organizationl arrangements), new and improved methods of collection, separation, and recovery of solid waste, and the environmentally safe disposal of nonrecoverable residues;

(2) providing training grants in occupations involving the design, operation, and maintenance of solid waste disposal systems;

(3) prohibiting future open dumping on the land and requiring the conversion of existing open dumps to facilities which do not pose a danger to the environment or to health;

(4) assuring that hazardous waste management practices are conducted in a manner which protects human health and the environment;

(5) requiring that hazardous waste be properly managed in the first instance thereby reducing the need for corrective action at a future date;

(6) minimizing the generation of hazardous waste and the land disposal of hazardous waste by encouraging process substitution, materials recovery, properly conducted recycling and reuse, and treatment;

(7) establishing a viable Federal-State partnership to carry out the purposes of this chapter and insuring that the

Administrator will, in carrying out the provisions of subchapter III of this chapter give a high priority to assisting and cooperating with States in obtaining full authorization of State programs under subchapter III of this chapter;

(8) providing for the promulgation of guidelines for solid waste collection, transport, separation, recovery, and disposal practices and systems;

(9) promoting a national research and development program for improved solid waste management and resource conservation techniques, more effective organizational arrangements, and new and improved methods of collection, separation, and recovery, and recycling of solid wastes and environmentally safe disposal of nonrecoverable residues;

(10) promoting the demonstration, construction, and application of solid waste management, resource recovery, and resource conservation systems which preserve and enhance the quality of air, water, and land resources; and

(11) establishing a cooperative effort among the Federal, State, and local governments and private enterprise in order to recover valuable materials and energy from solid waste.

(Pub.L. 89-272, Title II, § 1003, as added Pub.L. 94-580 § 2, Oct. 21, 1976, 90 Stat. 2798.)

§ 6943. Requirements for approval of plans

(a) Minimum requirements

In order to be approved under section 6947 of this title, each State plan must comply with the following minimum requirements—

(1) The plan shall identify (in accordance with section 6946(b) of this title) (A) the responsibilities of State, local, and regional authorities in the implementation of the State plan, (B) the distribution of Federal funds to the authorities responsible for development and implementation of the State plan, and (C) the means for coordinating regional planning and implementation under the State plan.

(2) The plan shall, in accordance with sections 6944(b) and 6945(a) of this title, prohibit the establishment of new open dumps within the State, and contain requirements that all solid waste (including solid waste originating in other States, but not including hazardous waste) shall be (A) utilized for resource recovery or (B) disposed of in sanitary landfills (within the meaning of section 6944(a) of this title) or otherwise disposed of in an environmentally sound manner.

(3) The plan shall provide for the closing or upgrading of all existing open dumps within the State pursuant to the requirements of section 6945 of this title.

(4) The plan shall provide for the establishment of such State regulatory powers as may be necessary to implement the plan.

(5) The plan shall provide that no State or local government within the State shall be prohibited under State or local law from negotiating and entering into long-term contracts for the supply of solid waste to resource recovery facilities, from entering into long-term contracts for the operation of such facilities, or from securing long-term markets for material and energy recovered from such facilities or for conserving materials or energy by reducing the volume of waste.

(6) The plan shall provide for such resource conservation or recovery and for the disposal of solid waste in

sanitary landfills or any combination of practices so as may be necessary to use or dispose of such waste in a manner that is environmentally sound.

(b)[1] Discretionary plan provisions relating to recycled oil

Any State plan submitted under this subchapter may include, at the option of the State, provisions to carry out each of the following:

(1) Encouragement, to the maximum extent feasible and consistent with the protection of the public health and the environment, of the use of recycled oil in all appropriate areas of State and local government.

(2) Encouragement of persons contracting with the State to use recycled oil to the maximum extent feasible, consistent with protection of the public health and the environment.

(3) Informing the public of the uses of recycled oil.

(4) Establishment and implementation of a program (including any necessary licensing of persons and including the use, where appropriate, of manifests) to assure that used oil is collected, transported, treated, stored, reused, and disposed of, in a manner which does not present a hazard to the public health or the environment.

Any plan submitted under this chapter before October 15, 1980, may be amended, at the option of the State, at any time after such date to include any provision referred to in this subsection.

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[1] So in original. Another subsec. (b) is set out below.

(b)[2] Energy and materials conservation and recovery feasibility planning and assistance

(1) A State which has a plan approved under this subchapter or which has submitted a plan for such approval shall be eligible for assistance under section 6948(a)(3) of this title if the Administrator determines that under such plan the State will —

(A) analyze and determine the economic and technical feasibility of facilities and programs to conserve resources which contribute to the waste stream or to recover energy and materials from municipal waste;

(B) analyze the legal, institutional, and economic impediments to the development of systems and facilities for conservation of energy or materials which contribute to the waste stream or for the recovery of energy and materials from municipal waste and make recommendations to appropriate governmental authorities for overcoming such impediments;

(C) assist municipalities within the State in developing plans, programs, and projects to conserve resources or recover energy and materials from municipal waste; and

(D) coordinate the resource conservation and recovery planning under subparagraph (C).

(2) The analysis referred to in paragraph (1)(A) shall include —

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[2] So in original. Another subsec. (b) is set out above.

(A) the evaluation of, and establishment of priorities among, market opportunities for industrial and commercial users of all types (including public utilities and industrial parks) to utilize energy and materials recovered from municipal waste;

(B) comparisons of the relative costs of energy recovered from municipal waste in relation to the costs of energy derived from fossil fuels and other sources;

(C) studies of the transportation and storage problems and other problems associated with the development of energy and materials recovery technology, including curbside source separation;

(D) the evaluation and establishment of priorities among ways of conserving energy or materials which contribute to the waste stream;

(E) comparison of the relative total costs between conserving resources and disposing of or recovering such waste; and

(F) studies of impediments to resource conservation or recovery, including business practices, transportation requirements, or storage difficulties.

Such studies and analyses shall also include studies of other sources of solid waste from which energy and materials may be recovered or minimized.

(c) Energy and materials conservation and recovery feasibility planning and assistance

(1) A State which has a plan approved under this subchapter or which has submitted a plan for such approval

shall be eligible for assistance under section 6948(a)(3) of this title if the Administrator determines that under such plan the State will —

(A) analyze and determine the economic and technical feasibility of facilities and programs to conserve resources which contribute to the waste stream or to recover energy and materials from municipal waste;

(B) analyze the legal, institutional, and economic impediments to the development of systems and facilities for conservation of energy or materials which contribute to the waste stream or for the recovery of energy and materials from municipal waste and make recommendations to appropriate governmental authorities for overcoming such impediments;

(C) assist municipalities within the State in developing plans, programs, and projects to conserve resources or recover energy and materials from municipal waste; and

(D) coordinate the resource conservation and recovery planning under subparagraph (C).

(2) The analysis referred to in paragraph (1)(A) shall include —

(A) the evaluation of, and establishment of priorities among, market opportunities for industrial and commercial users of all types (including public utilities and industrial parks) to utilize energy and materials recovered from municipal waste;

(B) comparisons of the relative costs of energy recovered from municipal waste in relation to the

costs of energy derived from fossil fuels and other sources;

(C) studies of the transportation and storage problems and other problems associated with the development of energy and materials recovery technology, including curbside source separation;

(D) the evaluation and establishment of priorities among ways of conserving energy or materials which contribute to the waste stream;

(E) comparison of the relative total costs between conserving resources and disposing of or recovering such waste; and

(F) studies of impediments to resource conservation or recovery, including business practices, transportation requirements, or storage difficulties.

Such studies and analyses shall also include studies of other sources of solid waste from which energy and materials may be recovered or minimized.

(d) Size of waste-to-energy facilities

Notwithstanding any of the above requirements, it is the intention of this chapter and the planning process developed pursuant to this chapter that in determining the size of the waste-to-energy facility, adequate provision shall be given to the present and reasonably anticipated future needs of the recycling and resource recovery interest within the area encompassed by the planning process.

(Pub.L. 89-272, Title II, § 4003, as added Pub.L. 94-580, § 2, Oct. 21, 1976, 90 Stat. 2814, and amended Pub.L. 96-463, § 5(a), (b), Oct. 15, 1980, 94 Stat. 2056; Pub.L. 96-482, §§ 18, 32(d), Oct. 21, 1980, 94 Stat. 2345, 2353.)

§ 6944. Criteria for sanitary landfills; sanitary landfills required for all disposal

(a) Criteria for sanitary landfills

Not later than one year after October 21, 1976, after consultation with the States, and after notice and public hearings, the Administrator shall promulgate regulations containing criteria for determining which facilities shall be classified as sanitary landfills and which shall be classified as open dumps within the meaning of this chapter. At a minimum, such criteria shall provide that a facility may be classified as a sanitary landfill and not an open dump only if there is no reasonable probability of adverse effects on health or the environment from disposal of solid waste at such facility. Such regulations may provide for the classification of the types of sanitary landfills.

(b) Disposal required to be in sanitary landfills, etc.

For purposes of complying with section 6943(2) of this title each State plan shall prohibit the establishment of open dumps and contain a requirement that disposal of all solid waste within the State shall be in compliance with such section 6943(2) of this title.

(c) Effective date

The prohibition contained in subsection (b) of this section shall take effect on the date six months after the date of promulgation of regulations under subsection (a) of this section.

(Pub.L. 89-272, Title II, § 4004, as added Pub.L. 94-580, § 2, Oct. 21, 1976, 90 Stat 2815.)

APPENDIX F

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

L.A. 31850
Super. Ct.
No. C 166219

COUNTY SANITATION DISTRICT NO. 2 OF LOS ANGELES COUNTY, a public agency,

Plaintiff-Respondent,

vs.

LOS ANGELES COUNTY EMPLOYEES ASSOCIATION, LOCAL 660, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO, et al.,

Defendants-Petitioners.

PETITION FOR REHEARING

TO THE HONORABLE ROSE ELIZABETH BIRD, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Plaintiff and Respondent County Sanitation District No. 2 of Los Angeles County ("District") respectfully requests the Court to give this matter reconsideration and to grant the District a rehearing for the following reasons:

1. The Court has misapplied its new standard for determination of the legality of public sector strikes to the facts in this case;

2. The Court's new standard for determination of the legality of public sector strikes as applied to the District's employees impermissibly interferes with the District's obligations under federal law; and

3. In any event, remand to the Superior Court to take evidence and render findings under this new standard is appropriate.

I

THE COURT HAS MISAPPLIED ITS NEW STANDARD FOR DETERMINATION OF THE LEGALITY OF PUBLIC SECTOR STRIKES TO THE FACTS IN THIS CASE.

The Court has held that the prior common law prohibition against all public employee strikes is no longer desirable under common law in this State. The Court has nevertheless imposed limitations on the right to strike recognized in this case, based upon considerations of public health and safety. The Court further concluded that the facts in this case did not fall within these health and safety limitations. Reasoning that there was no imminent threat to public health or safety in connection with the strike, the Court found that "the legality of the strike would have been upheld under [the Court's] newly adopted standard." Slip op. at p. 40. Even accepting the Court's change in the common law, the Court has misapplied its newly enunciated standard for determining the legality of public employee strikes to the strike in this case.

The standard this Court has formulated is as follows:

> "[S]trikes by public employees are not unlawful at common law unless or until it is clearly

> demonstrated that such a strike creates a substantial and imminent threat to the health or safety of the public. This standard allows exceptions in certain essential areas of public employment (e.g., the prohibition against firefighters and law enforcement personnel) and also requires the courts to determine on a case-by-case basis whether the public interest overrides the basic right to strike."

Slip op. at p. 38. Under this standard, the Court recognized that some categories of public sector strikes are *per se* illegal, since employees in those categories perform "essential services," the absence of which will virtually always constitute an imminent threat to public health or safety. Slip op. at pp. 36, 37.

The Court included in the category of "essential services," those provided by firefighters and law enforcement personnel. Slip op. at p. 39. This is appropriate not because there necessarily will be fires or an increase in criminal activity, or that fire or police departments necessarily will be unable to provide fire and police protection during such strikes, but because the clear *potential* for irreparable harm to public health and safety is always present in such cases. Additionally, when the threatened damage in such strikes occurs, such as, for example, uncontrolled fires or looting, it is generally too late for judicial intervention, since the threatened damage will almost always occur before the courts are able to react.

The services performed by the District's sanitation workers are "essential" in the same sense as those performed by firefighters and police. The District operates a complex network of sewage treatment facilities, which processes billions of gallons of raw sewage each week. At

any time, and without prior warning, the sophisticated systems and equipment essential to the processing of sewage can break down. Accordingly, the District's employees must constantly monitor and maintain the treatment plants. Therefore, any strike activity clearly entails the threat of interruption of the District's services and concomitant irreparable harm to public health. More importantly, the potential harm can occur far more quickly than the District could seek and obtain judicial relief.

A few examples easily illustrate this problem. The District operates several treatment plants which discharge effluent directly into the San Gabriel River. (R.Tr. 261; Ex. 102 through Ex. 119) If any of these treatment plants became nonoperational for any reason (e.g., if the disinfection/chlorination system[1] broke down), sewage with its attendant pathogenic microorganisms would begin flowing into the San Gabriel River. This situation, with its potentially devastating consequences, would last as long as the critical systems at these upstream plants were nonoperational. Since a breakdown to any critical system at such plants may occur with little or no warning, the absence of workers due to strike activities would have an immediate and irreparable impact on the public health.

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[1] The disinfection/cholrination systems at the District's sewage treatment plants utilize chlorine, an extremely toxic chemical. In the event of a leak or other problem associated with the chlorine, the District generally would have no choice but to shut this system down, thus discharging sewage into the San Gabriel River, until maintenance employees could be brought in to correct the problem. Further, a breakdown in this system could result in chlorine escaping in the form of a gas, a threat to public health wholly separate from the problems associated with sewage.

Other critical problems are presented at the District's Joint Water Pollution Control Plant in Carson ("JWPCP"), when employees are permitted to strike. For example, if the effluent pumps at the JWPCP stopped (as almost happened in this case), in hours the plant would be flooded by inflowing sewage. In less than a day, sewage could back up sufficiently to begin overflowing into the streets through manholes, again bringing the public into direct contact with raw sewage. Furthermore, since most of the JWPCP's critical equipment is underground, the flooding which was averted in this case would have rendered the JWPCP nonoperational for at least several months. Moreover, the District's only option, once the effluent pumps were operational, would be to pump hundreds of millions of gallons of raw sewage each day into the Pacific Ocean.[2] In short, the consequences of a mechanical breakdown at the JWPCP potentially could be far worse, and certainly less susceptible to repair, than damage caused by fires or looting. *See State of California v. City and County of San Francisco*, 94 Cal.App.3d 522, 156 Cal.Rptr. 542 (1979) (six-day sewage worker strike — court detailed the incalculable harm the discharge of 420 million gallons of sewage caused, a mere one-tenth of the amount potentially involved here in the 11-day strike); *Caso v. District Council 37, American Federation etc. Municipal Employees*, 43 App.Div.2d 159, 350 N.Y.S.2d 173 (1973) (sanitation strike resulted in discharge of one billion gallons of untreated sewage into East River).

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[2] At the time of the strike nine years ago, the District was processing 450 million gallons of raw sewage each day. (R. Tr. 261; Ex. 102 through Ex. 119)

The Court assumes, without basis in the record, that the District could have marshalled evidence of an imminent breakdown at its sewage treatment plants in time to present it to the Superior Court, to obtain an injunction, and to enforce it against sufficient employees to avert the potential disaster such a breakdown could cause. This simply is not the case. The Court's conclusion therefore places the District in the untenable position of not being able to seek injunctive relief until something has gone wrong. At that point, it will probably be too late to avoid irreparable harm. For this reason, the fact that the District was able to keep its sewage treatment plants operating during the strike does not render the strike legal, any more than a strike by firefighters or police would be legal simply because supervisory personnel were able to avert disaster.

In sum, the District respectfully submits that the strike in this case was illegal even under the Court's newly enunciated standard. Even though the District, through the use of extraordinary and costly measures, was able to operate during the strike, the strike nevertheless constituted an imminent threat of irreparable harm to the public health. Accordingly, the judgment in this case should be reinstated.

II

THE COURT'S STANDARD FOR DETERMINATION OF THE LEGALITY OF PUBLIC SECTOR STRIKES AS APPLIED TO THE DISTRICT'S EMPLOYEES IMPERMISSIBLY INTERFERES WITH THE DISTRICT'S OBLIGATIONS UNDER FEDERAL LAW.

To the extent the Court's new standard for determination of the legality of public sector strikes permits some interruption of essential sewage treatment services prior to enjoining a strike by sanitation employees, it impermissibly interferes with federal statutory policy concerning control of water pollution and the disposal of sewage and other wastes.

The Federal Water Pollution Control Act, 33 U.S.C. § 1251 *et seq.*, sets forth a comprehensive regulatory scheme expressly designed to limit the discharge of pollutants into the nation's navigable waters, including the Pacific Ocean. To achieve the goals set forth in this act, the act and regulations promulgated thereunder place limitations on the quality of effluent discharge, *inter alia*, from publicly-owned sewage treatment plants, and include substantial civil and criminal penalties for violation of these limitation standards. *See State of California v. City and County of San Francisco, supra;* 33 U.S.C. §§ 1311, 1312, 1317, 1318, 1319 & 1345; 40 C.F.R. § 401.1 *et seq.* Other federal statutes regulate the disposition of solid wastes and other materials on sanitary landfills. *See* Federal Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6901 *et seq.*

As set forth in Part I, *supra*, the Court's disposition of this case clearly permits the District's employees to attempt interruption of the District's services by striking, and apparently, renders such activities illegal only if the employees succeed in curtailing services. However, application of the court's new standard in this fashion clearly conflicts with the federal policy expressed in the above statutes. The only sure method to prevent a strike from interrupting processing of sewage and other waste material is to prevent the strike. Any other approach necessarily

involves the threat of impermissible effluent discharge, since the courts cannot react quickly enough under the Court's standard as applied in this case.

In sum, the Court must apply its new standard, based upon an imminent threat to public health or safety, in harmony with federal environmental policies and statutes. Any application which permits sanitation workers, such as those of the District, to strike conflicts with these policies and statutes and cannot stand. The District therefore respectfully requests that the Court reconsider the application of its new standard to the strike in this case, find the strike to be illegal and reinstate the judgment.

III

IN ANY EVENT, REMAND TO THE SUPERIOR COURT TO TAKE EVIDENCE AND RENDER FINDINGS UNDER THE NEW STANDARD IS APPROPRIATE.

As the Court correctly notes in the plurality opinion, its holding that public sector strikes are not necessarily illegal constitutes a change in the common law in California, which heretofore prohibited all strikes by public sector employees. Slip.op. at p. 1. Accordingly, whether the strike in this case constituted an imminent threat to public health or safety simply was not an issue before the Superior Court. For this reason, the Superior Court made no findings on this question.

The District submits that an imminent threat to public health and safety already appears in the record. Should the Court disagree, however, a remand of this case is proper. Inasmuch as the Court's change in the law has now made

an issue of whether the strike constituted an imminent threat to public health or safety, it is appropriate to allow the District opportunity to augment the record and permit the Superior Court to render findings and conclusions with respect to this question. *See Green v. Superior Court*, 10 Cal.3d 616, 638, 111 Cal.Rptr. 704, 513 P.2d 1168 (1974) (remand to Superior Court necessary to consider the breach of implied warranty of habitability recognized by the Supreme Court in that case). The District therefore respectfully submits that remand of the case to the Superior Court for appropriate presentation of evidence and findings on the issues presented under the Court's newly enunciated standard is proper.

IV

CONCLUSION

For all of the foregoing reasons, the District respectfully requests that this Court vacate its decision in this proceeding and reinstate the judgment of the Superior Court, or in the alternative, that this Court remand this cause to the Superior Court for further findings and presentation of evidence.

Dated: May 23, 1985

Respectfully submitted,

MUSICK, PEELER & GARRETT

By _____
Steven D. Weinstein

Attorneys for COUNTY SANITATION DISTRICT NO. 2 OF LOS ANGELES

APPENDIX G

ORDER DENYING REHEARING
Order Due July 12, 1985
L.A. No. 31850

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA
IN BANK

COUNTY SANITATION DISTRICT NO. 2
OF LOS ANGELES COUNTY,
Respondent;

v.

LOS ANGELES COUNTY EMPLOYEES
ASSOCIATION, LOCAL 660, ETC., ET AL.,
Appellants.

FILED JUNE 27, 1985
Laurence P. Gill, Clerk

espondent's petition for rehearing DENIED.

BIRD
Chief Justice

APPENDIX H

PART 241-GUIDELINES FOR THE LAND DISPOSAL OF SOLID WASTES

Subpart A—General Provisions

Sec.

241.100 Scope.
241.101 Definitions.

Subpart B-Requirements and Recommended Procedures

241.200 Solid wastes accepted.
241.200-1 Requirement.
241.200-2 Recommended procedures: Design.
241.200-3 Recommended procedures: Operations.
241.201 Solid wastes excluded.
241.201-1 Requirement.
241.201-2 Recommended procedures: Design.
241.201-3 Recommended procedures: Operations.
241.202 Site Selection.
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241.202-3 Recommended procedures: Operations.
241.203 Design.
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241.205 Air quality.
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241.206 Gas control.
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241.207 Vectors.
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241.208 Aesthetics.
241.208-1 Requirement.
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241.209 Cover material.
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241.211 Safety.
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241.211-2 Recommended procedures: Design.

241.211-3 Recommended procedures: Operations.

241.212 Records.

241.212-1 Requirement.

241.212-2 Recommended procedures: Design.

241.212-3 Recommended procedures: Operations.

AUTHORITY: Section 209(a) of the Solid Waste Disposal Act of 1965 (Pub.L. 89-272) as amended by the Resource Recovery Act of 1970 (Pub.L 91-512).

SOURCE: 39 FR 29333, Aug. 14, 1974, unless otherwise noted.

Subpart A-General Provisions

§ 241.100 Scope.

(a) The guidelines are generally applicable to the land disposal of all solid waste materials. However, the guidelines do not apply to hazardous, agricultural, and mining wastes because of the lack of sufficient information upon which to base recommended procedures. Concerning the specific practice of land disposal of milled solid wastes, EPA guidance is contained in a position statement issued in November 1972.

(b) The requirement sections contained herein delineate minimum levels of performance required of any solid waste land disposal site operation. The recommended procedures sections are presented to suggest preferred methods by which the objectives of the requirements can be realized.[1]

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[1] Further guidance may be found in the EPA publication, "Sanitary Landfill Design and Operations," which served as a basis for the

The recommended procedures are based on the practice of sanitary landfilling municipal solid waste: Normally, residential, and commercial solid waste generated within a community. Sanitary landfilling is the most widely applied environmentally acceptable land disposal method. If techniques other than the recommended procedures are used, or wastes other than municipal solid wastes are disposed, it is the obligation of the proposed facility's owner and operator to demonstrate to the responsible agency in advance by means of engineering calculations and data that the techniques employed will satisfy the requirements.

(c) Pursuant to section 211 of the Solid Waste Disposal Act, as amended, these guidelines are mandatory for Federal agencies. In addition, they are recommended to State, interstate, regional, and local government agencies for use in their activities.

(d) These guidelines are intended to provide for environmentally acceptable land disposal site operations. The guidelines do not establish new standards but set forth requirements and recommended procedures to ensure that the design, construction, and operation of both existing and future land disposal sites meet the health and environmental standards for the area in which they are located. The guidelines are intended to apply equally to all solid waste generated by Federal agencies, regardless of whether processed or disposed of on or off Federal property; and solid waste generated by non-Federal entities, but processed or disposed of on Federal property. However, in the case of many Federal facilities such as Post Offices, military recruiting stations, and other offices, local community solid waste processing and disposal facilities are utilized, and

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development of these guidelines.

processing and disposal is not within the management control of the Federal agency. Thus, implementation of the guidelines can be expected only in those situations where the Federal agency is able to exercise direct management control over the processing and disposal operations. However, every effort must be made by the responsible agency, where off-site facilities are utilized, to attain processing and disposal facilities that are in compliance with the guidelines. Where non-Federal generated solid waste is processed and disposed of on Federal land and/or facilities, those facilities and/or sites must be in compliance with these guidelines. Determination of compliance to meet the requirements of the guidelines rests with the responsible agency, and they have the authority to determine how such compliance may occur.

[39 FR 29333, Aug. 14, 1974; 40 FR 5159, Feb. 4, 1975]

§ 241.101 Definitions.

As used in these guidelines:

(a) "Cell" means compacted solid wastes that are enclosed by natural soil or cover material in a land disposal site.

(b) "Cover material" means soil or other suitable material that is used to cover compacted solid wastes in a land disposal site.

(c) "Daily cover" means cover material that is spread and compacted on the top and side slopes of compacted solid waste at least at the end of each operating day in order to control vectors, fire, moisture, and erosion and to assure an aesthetic appearance.

(d) "Final cover" means cover material that serves the same functions as daily cover but, in addition, may be permanently exposed on the surface.

(e) "Free moisture" means liquid that will drain freely by gravity from solid materials.

(f) "Groundwater" means water present in the saturated zone of an aquifer.

(g) "Hazardous wastes" means any waste or combination of wastes which pose a substantial present or potential hazard to human health or living organisms because such wastes are non-degradable or persistent in nature or because they can be biologically magnified, or because they can be lethal, or because they may otherwise cause or tend to cause detrimental cumulative effects.

(h) "Infectious waste" means: (1) Equipment, instruments, utensils, and fomites of a disposable nature from the rooms of patients who are suspected to have or have been diagnosed as having a communicable disease and must, therefore, be isolated as required by public health agencies; (2) laboratory wastes, such as pathological specimens (e.g. all tissues, specimens of blood elements, excreta, and secretions obtained from patients or laboratory animals) and disposable fomites (any substance that may harbor or transmit pathogenic organisms) attendant thereto; (3) surgical operating room pathologic specimens and disposable fomites attendant thereto and similar disposable materials from out-patient areas and emergency rooms.

(i) "Intermediate cover" means cover material that serves the same functions as daily cover, but must resist erosion for a longer period of time, because it is applied on areas where additional cells are not to be constructed for extended periods of time.

(j) "Leachate" means liquid that has percolated through solid waste and has extracted dissolved or suspended materials from it.

(k) "Municipal solid wastes" means normally, residential, and commercial solid waste generated within a community.

(l) "Open burning" means burning of solid wastes in the open, such as in an open dump.

(m) "Open dump" means a land disposal site at which solid wastes are disposed of in a manner that does not protect the environment, is susceptible to open burning, and is exposed to the elements, vectors, and scavengers.

(n) "Plans" means reports and drawings, including a narrative operating description, prepared to describe the land disposal site and its proposed operation.

(o) "Residue" means all the solids that remain after completion of thermal processing, including bottom ash, fly ash, and grate siftings.

(p) "Responsible agency" means the organizational element that has the legal duty to ensure that owners, operators or users of land disposal sites comply with these guidelines.

(q) "Runoff" means the portion of precipitation that drains from an area as surface flow.

(r) "Salvaging" means the controlled removal of waste materials for utilization.

(s) "Sanitary landfill" means a land disposal site employing an engineered method of disposing of solid wastes on land in a manner that minimizes environmental hazards by spreading the solid wastes in thin layers, compacting the solid wastes to the smallest practical

volume, and applying and compacting cover material at the end of each operating day.

(t) "Scavenging" means uncontrolled removal of solid waste materials.

(u) "Sludge" means the accumulated semiliquid suspension of settled solids deposited from wastewaters or other fluids in tanks or basins. It does not include solids or dissolved material in domestic sewage or other significant pollutants in water resources, such as silt, dissolved or suspended solids in industrial wastewater effluents, dissolved materials in irrigation return flows or other common water pollutants.

(v) "Solid wastes" means garbage, refuse, sludges, and other discarded solid materials resulting from industrial and commercial operations and from community activities. It does not include solids or dissolved material in domestic sewage or other significant pollutants in water resources, such as silt, dissolved or suspended solids in industrial wastewater effluents, dissolved materials in irrigation return flows or other common water pollutants.

(w) "Vector" means a carrier, usually an arthropod, that is capable of transmitting a pathogen from one organism to another.

(x) "Water table" means the upper water level of a body of groundwater.

(y) "Working face" means that portion of the land disposal site where solid wastes are discharged and are spread and compacted prior to the placement of cover material.

Subpart B-Requirements and Recommended Procedures

§ 241.200 Solid wastes accepted.

§ 241.200-1 Requirement.

In consultation with the responsible agencies the owner/operator shall determine what wastes shall be accepted and shall identify any special handling required. In general, only wastes for which the facility has been specifically designed shall be accepted; however, other wastes may be accepted if it has been demonstrated to the responsible agency that they can be satisfactorily disposed with the design capability of the facility or after appropriate facility modifications.

§ 241.200-2 Recommended procedures: Design.

The plans should specify the procedures to be employed for wastes requiring special handling.

§ 241.200-3 Recommended procedures: Operations.

(a) Routine sanitary landfill techniques of spreading and compacting solid wastes and placing cover material at the end of each operating day should be used to dispose of municipal solid wastes.

(b) Certain bulky wastes, such as automobile bodies, furniture, and appliances may be salvaged in a controlled manner at a point other than the working face. Otherwise, they should be crushed on solid ground and then pushed onto the working face near the bottom of the cell. Other

bulky items, such as demolition and construction debris, tree stumps, and large timbers, should be pushed onto the working face near the bottom of the cell.

(c) Procedures for disposing of dead animals have been established by law in most States, and the operation should comply accordingly. In most cases, small carcasses should be placed on the working face with other municipal solid wastes and covered immediately. In the absence of applicable State laws, large carcasses should be placed in a pit and provided with a cover of compacted soil or other suitable material to encourage runoff of precipitation.

(d) Water treatment plant sludges containing no free moisture and digested or heat treated waste water treatment plant sludges containing no free moisture should be placed on the working face along with municipal solid wastes and covered with soil or municipal solid wastes. The quantities accepted should be determined by operational problems encountered at the working face.

(e) Incinerator and air pollution control residues containing no free moisture should be incorporated into the working face and covered at such intervals as necessary to prevent them from becoming airborne.

§ 241.201 Solid wastes excluded.

§ 241.201-1 Requirement.

Using information supplied by the waste generator/owner, the responsible agency and the disposal site owner/operator shall jointly determine specific wastes to be excluded and shall identify them in the plans. The generator/owner of excluded wastes shall consult with the responsible agency in determining an alternative method of

disposal for excluded wastes. The criteria used in considering whether a waste is unacceptable shall include the hydrogeology of the site, the chemical and biological characteristics of the waste, alternative methods available, environmental and health effects, and the safety of personnel. Disposal of pesticides and pesticide containers shall be consistent with the Federal Environmental Pesticides Control Act of 1972 (Pub. L. 92-516) and recommended procedures and regulations promulgated thereunder.

§ 241.201-2 Recommended procedures: Design.

Under certain circumstances it may be necessary to accept special wastes at land disposal sites. The following special wastes require specific approval of the responsible agency for acceptance at the site: Hazardous wastes, infectious institutional wastes, bulk liquids and semi-liquids, sludges containing free moisture, highly flammable or volatile substances, raw animal manure, septic tank pumpings, raw sewage sludge, and certain industrial process wastes. Where the use of the disposal site for such wastes is planned, a special assessment is required of the following items: The site characteristics, nature and quantities of the waste, and special design and operations precautions to be implemented to insure environmentally safe disposal.

§ 241.201-3 Recommended procedures: Operations.

Regular users of the land disposal site should be provided with a list of the materials to be excluded. The list should also be displayed prominently at the site entrance. If a

regular user persists in making unacceptable deliveries, he should be barred from the site and reported to the responsible agency.

§ 241.202 Site selection.

§ 241.202-1 Requirement.

Site selection and utilization shall be consistent with public health and welfare, and air and water quality standards and adaptable to appropriate land-use plan.

§ 241.202-2 Recommended procedures: Design.

(a) The hydrogeology of the site should be evaluated in order to design site development in a manner to protect or minimize the impact on groundwater resources. Unacceptable hydrogeologic conditions may be altered to render the site acceptable, but all alterations should be detailed in the plans. Precipitation, evapotranspiration, and other climatological conditions should be considered in site selection and design.

(b) Characteristics of on-site soil should be evaluated with respect to their effects on site operations, such as vehicle maneuverability and use as cover material.

(c) Environmental factors, climatological conditions, and socioeconomic factors should be given full consideration as selection criteria.

(d) The site should be accessible to vehicles which the site is designed to serve by all-weather roads leading from the public road systems; temporary roads should be provided as needed to deliver wastes to the working face.

(e) The site should not be located in an area where the attraction of birds would be a hazard to low-flying aircraft.

§ 241.202-3 Recommended procedures: Operations.

Not applicable.

§ 241.203 Design.

§ 241.203-1 Requirement.

Plans for the design, construction, and operation of new sites or modifications to existing sites shall be prepared or approved by a professional engineer. The plans shall be submitted to the responsible agency for review and, if warranted, approval.

§ 241.203-2 Recommended procedures: Design.

(a) The types and quantities of all solid wastes expected to be disposed of at the facility should be determined by survey and analysis to form a basis for design.

(b) Site development plans should be prepared or approved by a professional engineer and should include: The various design factors addressed elsewhere in the guidelines, as well as:

(1) Initial and final topographies at contour intervals of 5 feet or less.

(2) Land use and zoning within one-quarter mile of the site including location of all residents, buildings, wells, water courses, arroyos, rock outcroppings, roads, and soil or rock borings. All airports within the vicinity of the site

should be identified to aid in assessing the potential hazard of birds to aircraft.

(3) Location of all utilities within 500 feet of the site.

(4) Employee convenience and equipment maintenance facilities.

(5) Narrative descriptions, with associated drawings, indicating site development and operation procedures.

(c) Plans should describe the projected use of the completed land disposal site. In addition to maintenance programs and provisions, where necessary, for monitoring and controlling decomposition gases and leachate, the plans should address the following ultimate use criteria:

(1) Cultivated Area. The major concern if the completed site is to be cultivated is that the integrity of the final cover not be disturbed by agricultural cultivation activities. In this regard, a sufficient depth of cover material to allow cultivation and to support vegetation should be applied in addition to that recommended for final cover.

(2) Structures. It is not recommended practice to construct major structures on a completed land disposal site. If major structures are to be built near a completed land disposal site, a professional engineer should approve their design and construction including provision for protection against potential hazards of solid waste decomposition gases.

§ 241.203-3 Recommended procedures: Operations.

Not applicable.

§ 241.204 Water quality.

§ 241.204-1 Requirement.

The location, design, construction, and operation of the land disposal site shall conform to the most stringent of applicable water quality standards established in accordance with or effective under the provisions of the Federal Water Pollution Control Act, as amended. In the absence of such standards, the land disposal site shall be located, designed, constructed and operated in such a manner as to provide adequate protection to ground and surface waters used as drinking water supplies.

§ 241.204-2 Recommended procedures: Design.

(a) Plans should include:

(1) Current and projected use of water resources in the potential zone of influence of the land disposal site.

(2) Groundwater elevation and movement and proposed separation between the lowest point of the lowest cell and the predicted maximum water table elevation.

(3) Potential interrelationship of the land disposal site, local aquifers, and surface waters based on historical records or other sources of information.

(4) Background and initial quality of water resources in the potential zone of influence of the land disposal site.

(5) Proposed location of observation wells, sampling stations, and testing program planned, when appropriate.

(6) Description of soil and other geologic material to a depth adequate to allow evaluation of the water quality protection provided by the soil and other geologic material.

(7) Provision for surface water runoff control to minimize infiltration and erosion of cover material.

(8) Potential of leachate generation and proposed control systems, where necessary, for the protection of ground and surface water resources.

(b) If a land disposal site is located in a flood plain, it should be protected against at least the 50-year design flood by impervious dikes and other appropriate means to prevent the floodwaters from contacting municipal solid waste.

§ 241.204-3 Recommended procedures: Operations.

(a) Surface water courses and runoff should be diverted from the land disposal site (especially from the working face) by means such as trenches, conduits, and proper grading. The land disposal site should be constructed and graded so as to promote rapid surface water runoff without excessive erosion. Regrading should be done as required during construction and after completion to avoid ponding of precipitation and to maintain cover material integrity.

(b) Siltation or retention basins or other approved methods of retarding runoff should be used where necessary to avoid stream siltation or flooding problems due to excessive runoff.

(c) Leachate collection and treatment systems should be used where necessary to protect ground and surface water resources.

(d) Municipal solid wastes and leachate therefrom should not be allowed to contact ground or surface water so as to impair the water's use.

§ 241.205 Air quality.

§ 241.205-1 Requirement.

The design, construction, and operation of the land disposal site shall conform to applicable ambient air quality standards and source control regulations established under the authority of the Clean Air Act, as amended, or State or local standards effective under that Act, if the latter are more stringent.

§ 241.205-2 Recommended procedures: Design.

Plans should include an effective dust control program.

§ 241.205-3 Recommended procedures: Operations.

(a) Open burning of municipal solid waste should be prohibited.

(b) Dust control measures should be initiated as necessary to protect the health and safety of facility personnel, nearby residents, and persons using the facility.

§ 241.206 Gas control.

§ 241.206-1 Requirement.

Decomposition gases generated within the land disposal site shall be controlled on site, as necessary, to avoid posing a hazard to occupants of adjacent property.

§ 241.206-2 Recommended procedures: Design.

Plans should assess the need for gas control and indicate the location and design of any vents, barriers, or other control measures to be provided.

§ 241.206-3 Recommended procedures: Operations.

(a) Decomposition gases should not be allowed to migrate laterally from the land disposal site to endanger occupants of adjacent properties. They should be vented to the atmosphere directly through the cover material, cutoff trenches, or ventilation systems in such a way that they do not accumulate in explosive or toxic concentrations, especially within structures. (Information on the limits of flammability of gases is available in such references as the "Handbook of Chemistry and Physics," 54th ed. CRC Press, Inc., Cleveland, 1973.)

(b) Decomposition gases should not be allowed to concentrate in a manner that will pose an explosion or toxicity hazard.

§ 241.207 Vectors.

§ 241.207-1 Requirement.

Conditions shall be maintained that are unfavorable for the harboring, feeding, and breeding of vectors.

§ 241.207-2 Recommended procedures: Design.

Plans should include contingency programs for vector control, and the operator should be prepared at all times to implement those procedures.

§ 241.207-3 Recommended procedures: Operations.

Vector control contingency programs should be implemented when necessary to prevent or rectify vector problems.

§ 241.208 Aesthetics.

§ 241.208-1 Requirement

The land disposal site shall be designed and operated at all times in an aesthetically acceptable manner.

§ 241.208-2 Recommended procedures: Design.

Plans should include an effective litter control program.

§ 241.208-3 Recommended procedures: Operations.

(a) Portable litter fences or other devices should be used in the immediate vicinity of the working face and at other appropriate locations to control blowing litter. At the end of each operating day, or more often as required, litter should be removed from the fences and incorporated into the cell being used. Alternatively, the litter may be containerized for disposal on the next operating day.

(b) Wastes that are easily moved by wind should be covered, as necessary, to prevent their becoming airborne and scattered.

(c) On-site vegetation should be cleared only as necessary. Natural windbreaks, such as green belts, should be maintained where they will improve the appearance and operation of the land disposal site. Buffer strips should be planted and/or berms constructed as necessary to screen the working force from nearby residences or major roadways.

(d) Salvage operations should be conducted in such a manner as to not detract from the appearance of the land disposal site. Salvaged material should be removed from the land disposal site frequently enough to maintain aesthetic acceptability.

§ 241.209 Cover material.

§ 241.209-1 Requirement.

Cover material shall be applied as necessary to minimize fire hazards, infiltration of precipitation, odors, and blowing litter; control gas venting and vectors; discourage scavenging; and provide a pleasing appearance.

§ 241.209-2 Recommended procedures: Design.

Plans should specify:

(a) Cover material sources and soil classifications (Unified Soil Classification System or U.S. Department of Agriculture Classification System).

(b) Surface grades and side slopes need to promote maximum runoff, without excessive erosion, to minimize infiltration.

(c) Procedures to promote vegetative growth as promptly as possible to combat erosion and improve appearance of idle and completed areas.

(d) Procedures to maintain cover material integrity, e.g., regarding and recovering.

§ 241.209-3 Recommended procedures: Operations.

(a) Daily cover should be applied regardless of weather; sources of cover material should, therefore, be accessible on all operating days. The thickness of the compacted daily cover should not be less than 6 inches.

(b) Intermediate cover should be applied on areas where additional cells are not to be constructed for extended periods of time; normally, 1 week to 1 year. The thickness of the compacted intermediate cover should not be less than 1 foot.

(c) Final cover should be applied on each area as it is completed or if the area is to remain idle for over 1 year. The thickness of the compacted final cover should not be less than 2 feet.

§ 241.210 Compaction.

§ 241.210-1 Requirement.

In order to conserve land disposal site capacity, thereby preserving land resources, and to minimize moisture infiltration and settlement, municipal solid waste and cover

material shall be compacted to the smallest practicable volume.

§ 241.210-2 Recommended procedures: Design.

(a) Arrangements should be made and indicated in the plans whereby substitute equipment will be available to provide uninterrupted service during routine equipment maintenance periods or equipment breakdowns.

(b) An equipment maintenance facility should be provided onsite, or appropriate contract arrangements should be made to receive such service.

(c) Equipment manuals, catalogs, and spare parts lists should be compiled and readily available onsite.

§ 241.210-3 Recommended procedures: Operations.

(a) Municipal solid waste handling equipment should on any operating day be capable of performing the following functions:

(1) Spread the solid waste accepted in layers no more than 2 feet thick while confining it to the smallest practicable area;

(2) Compact the spread solid wastes to the smallest practicable volume (several such compacted layers will form a cell); and

(3) Place, spread, and compact the cover material over the cell at least by the end of each day's operation.

(b) A preventive maintenance program should be employed to maintain equipment in operating order.

(c) An operating manual describing the various tasks that must be performed during a typical shift should be available to employees for reference.

§ 241.211 Safety.

§ 241.211-1 Requirement.

The land disposal site shall be designed, constructed, and operated in such a manner as to protect the health and safety of personnel associated with the operation. Pertinent provisions of the Occupational Safety and Health Act of 1970 (Pub.L. 91-596) and regulation promulgated thereunder shall apply.

§ 241.211-2 Recommended procedures: Design.

A manual describing safety precautions and procedures to be employed should be developed.

§ 241.211-3 Recommended procedures: Operations.

(a) A safety manual should be available for use by employees, and they should be instructed in application of its procedures.

(b) Personal safety devices such as hardhats, gloves, safety glasses, and footwear should be provided to facility employees.

(c) Safety devices, including but not limited to such items as rollover protective structures, seatbelts, audible reverse warning devices, and fire extinguishers should be provided

on all equipment used to spread and compact solid wastes or cover material at the facility.

(d) Provisions should be made to extinguish any fires in wastes being delivered to the site or which occur at the working face or within equipment or personnel facilities.

(e) Communications equipment should be available onsite for emergency situations.

(f) Scavenging should be prohibited at all times to avoid injury and to prevent interference with site operations.

(g) Access to the site should be controlled and should be by established roadways only. The site should be accessible only when operating personnel are on duty. Large containers may be placed at the site entrance so that users can conveniently deposit waste after hours. The containers and the areas around them should be maintained in a sanitary and liter-free condition.

(h) Traffic signs or markers should be provided to promote an orderly traffic pattern to and from the discharge area, maintain efficient operating conditions, and, if necessary, restrict access to hazardous areas. Drivers of manually discharging vehicles should not hinder operation of mechanically discharging vehicles. Vehicles should not be left unattended at the working face or along traffic routes. If a regular user persistently poses a safety hazard, he should be barred from the site and reported to the responsible agency.

§ 241.212 Records.

§ 241.212-1 Requirement.

The owner/operator of the land disposal site shall maintain records and monitoring data to be provided, as required, to the responsible agency.

§ 241.212-2 Recommended procedures: Design.

Where appropriate, plans should prescribe methods to be used in maintaining records and monitoring the environmental impact of the land disposal site. Information on recording and monitoring requirements should be obtained from the responsible agency.

§ 241.212-3 Recommended procedures: Operations

(a) Records should be maintained covering at least the following:

(1) Major operational problems, complaints, or difficulties.

(2) Qualitative and quantitative evaluation of the environmental impact of the land disposal site, with regard to the effectiveness of gas and leachate control, including results of: (i) Leachate sampling and analyses; (ii) gas sampling and analyses; (iii) ground and surface water quality sampling and analyses upstream and downstream of the site.

(3) Vector control efforts.

(4) Dust and litter control efforts.

(5) Quantitative measurements of the solid wastes handled. This should be accomplished through routine or periodic utilization of scales and topographic surveys of the site.

(6) Description of solid waste materials received, identified by source of materials.

(b) Upon completion of the site, a detailed description, including a plat, should be recorded with the area's land recording authority. The description should include general types and locations of wastes, depth of fill, and other information of interest to potential landowners.

Subpart A—General Provisions

PART 257 CRITERIA FOR CLASSIFICATION OF SOLID WASTE DISPOSAL FACILITIES AND PRACTICES

Sec.

257.1 Scope and purpose.

257.2 Definitions.

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257.3-1 Floodplains.

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257.3-8 Safety.

257.4 Effective date.

Appendix I

Appendix II

Authority: Sec. 1008(a)(3) and sec. 4004(a), Pub.L. 94-580, 90 Stat. 2803 and 2815 (42 U.S.C. 6907(a)(3) and 6944(a)); sec. 405(d), Pub.L. 95-217, 91 Stat. 1606 (33 U.S.C. 1345(d)).

Source: 44 FR 53460, Sept. 13, 1979, unless otherwise noted.

§ 257.1 Scope and purpose.

(a) These criteria are for use under the Resource Conservation and Recovery Act (the Act) in determining which solid waste disposal facilities and practices pose a reasonable probability of adverse effects on health or the environment. Unless otherwise provided, these criteria are adopted for purposes of both Section 1008(a)(3) and Section 4004(a) of the Act.

(1) Facilities failing to satisfy criteria adopted for purposes of Section 4004(a) will be considered open dumps for purposes of State solid waste management planning under the Act.

(2) Practices failing to satisfy criteria adopted for purposes of Section 1008(a)(3) constitute open dumping, which is prohibited under Section 4005 of the Act.

(b) These criteria also provide guidelines for sludge utilization and disposal under Section 405(d) of the Clean Water Act, as amended. To comply with Section 405(e) the owner or operator of any publicly owned treatment works

must not violate these criteria in the disposal of sludge on the land.

(c) These criteria apply to all solid waste disposal facilities and practices with the following exceptions:

(1) The criteria do not apply to agricultural wastes, including manures and crop residues, returned to the soil as fertilizers or soil conditioners.

(2) The criteria do not apply to overburden resulting from mining operations intended for return to the mine site.

(3) The criteria do not apply to the land application of domestic sewage or treated domestic sewage. The criteria do apply to disposal of sludges generated by treatment of domestic sewage.

(4) The criteria do not apply to the location and operation of septic tanks. The criteria do, however, apply to the disposal of septic tank pumpings.

(5) The criteria do not apply to solid or dissolved materials in irrigation return flows.

(6) The criteria do not apply to industrial discharges which are point sources subject to permits under Section 402 of the Clean Water Act, as amended.

(7) The criteria do not apply to source, special nuclear or byproduct material as defined by the Atomic Energy Act, as amended (68 Stat. 923).

(8) The criteria do not apply to hazardous waste disposal facilities which are subject to regulation under Subtitle C of the Act.

(9) The criteria do not apply to disposal of solid waste by underground well injection subject to the regulations (40 CFR Part 146) for the Underground Injection Control Program (UICP) under the Safe Drinking Water Act, as amended, 42 U.S.C. 3007 et seq.

[44 FR 53460, Sept. 13, 1979, as amended at 46 FR 47052, Sept. 23, 1981]

§ 257.2 Definitions.

The definitions set forth in Section 1004 of the Act apply to this part. Special definitions of general concern to this part are provided below, and definitions especially pertinent to particular sections of this part are provided in those sections.

"Disposal" means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.

"Facility" means any land and appurtenances thereto used for the disposal of solid wastes.

"Leachate" means liquid that has passed through or emerged from solid waste and contains soluble, suspended or miscible materials removed from such wastes.

"Open dump" means a facility for the disposal of solid waste which does not comply with this part.

"Practice" means the act of disposal of solid waste.

"Sanitary landfill" means a facility for the disposal of solid waste which complies with this part.

"Sludge" means any solid, semisolid, or liquid waste generated from a municipal, commercial, or industrial wastewater treatment plant, water supply treatment plant, or air pollution control facility or any other such waste having similar characteristics and effect.

"Solid waste" means any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities, but does not include solid or dissolved materials in domestic sewage, or solid or dissolved material in irrigation return flows or industrial discharges which are point sources subject to permits under Section 402 of the Federal Water Pollution Control Act, as amended (86 Stat. 880), or source, special nuclear, or byproduct material as defined by the Atomic Energy Act of 1954, as amended (68 Stat. 923).

"State" means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands.

[44 FR 53460, Sept. 13, 1979; 44 FR 58910, Oct. 12, 1979]

§ 257.3 Criteria for classification of solid waste disposal facilities and practices.

Solid waste disposal facilities or practices which violate any of the following criteria pose a reasonable probability of adverse effects on health or the environment:

§ 257.3-1 Floodplains.

(a) Facilities or practices in floodplains shall not restrict the flow of the base flood, reduce the temporary water storage capacity of the floodplain, or result in washout of solid waste, so as to pose a hazard to human life, wildlife, or land or water resources.

(b) As used in this section:

(1) "Based flood" means a flood that has a 1 percent or greater chance of recurring in any year or a flood of a magnitude equalled or exceeded once in 100 years on the average over a significantly long period.

(2) "Floodplain" means the lowland and relatively flat areas adjoining inland and coastal waters, including flood-prone areas of offshore islands, which are inundated by the base flood.

(3) "Washout" means the carrying away of solid waste by waters of the base flood.

[44 FR 53460, Sept. 13, 1979; 44 FR 54708, Sept. 21, 1979]

§ 257.3-2 Endangered species.

(a) Facilities or practices shall not cause or contribute to the taking of any endangered or threatened species of plants, fish, or wildlife.

(b) The facility or practice shall not result in the destruction or adverse modification of the critical habitat of endangered or threatened species as identified in 50 CFR Part 17.

(c) As used in this section:

(1) "Endangered or threatened species" means any species listed as such pursuant to Section 4 of the Endangered Species Act.

(2) "Destruction or adverse modification" means a direct or indirect alteration of critical habitat which appreciably diminishes the likelihood of the survival and recovery of threatened or endangered species using that habitat.

(3) "Taking" means harassing, harming, pursuing, hunting, wounding, killing, trapping, capturing, or collecting or attempting to engage in such conduct.

§ 257.3-3 Surface water.

(a) For purposes of Section 4004(a) of the Act, a facility shall not cause a discharge of pollutants into waters of the United States that is in violation of the requirements of the National Pollutant Discharge Elimination System (NPDES) under Section 402 of the Clean Water Act, as amended.

(b) For purposes of Section 4004(a) of the Act, a facility shall not cause a discharge of dredged material or fill material to waters of the United States that is in violation of the requirements under Section 404 of the Clean Water Act, as amended.

(c) A facility or practice shall not cause non-point source pollution of waters of the United States that violates applicable legal requirements implementing an areawide or Statewide water quality management plan that has been approved by the Administrator under Section 208 of the Clean Water Act, as amended.

(d) Definitions of the terms "Discharge of dredged material", "Point source", "Pollutant", "Waters of the United States", and "Wetlands" can be found in the Clean Water Act, as amended, 33 U.S.C. 1251 et seq., and implementing regulations, specifically 33 CFR Part 323 (42 FR 37122, July 19, 1977).

[44 FR 53460, Sept. 13, 1979, as amended at 46 FR 47052, Sept. 23, 1981]

§ 257.3-4 Ground water.

(a) A facility or practice shall not contaminate an underground drinking water source beyond the solid waste boundary or beyond an alternative boundary specified in accordance with paragraph (b) of this section.

(b) (1) For purposes of Section 1008(a)(3) of the Act or Section 405(d) of the CWA, a party charged with open dumping or a violation of Section 405(e) may demonstrate that compliance should be determined at an alternative boundary in lieu of the solid waste boundary. The court shall establish such an alternative boundary only if it finds that such a change would not result in contamination of ground water which may be needed or used for human consumption. This finding shall be based on analysis and consideration of all of the following factors that are relevant:

(i) The hydrogeological characteristics of the facility and surrounding land, including any natural attenuation and dilution characteristics of the aquifer;

(ii) The volume and physical and chemical characteristics of the leachate;

(iii) The quantity, quality, and direction of flow of ground water underlying the facility;

(iv) The proximity and withdrawal rates of groundwater users;

(v) The availability of alternative drinking water supplies;

(vi) The existing quality of the ground water, including other sources of contamination and their cumulative impacts on the ground water;

(vii) Public health, safety, and welfare effects.

(2) For purposes of Sections 4004(a) and 1008(a)(3), the State may establish an alternative boundary for a facility to be used in lieu of the solid waste boundary only if it finds that such a change would not result in the contamination of ground water which may be needed or used for human consumption. Such a finding shall be based on an analysis and consideration of all of the factors identified in paragraph (b)(1) of this section that are relevant.

(c) As used in this section:

(1) "Aquifer" means a geologic formation, group of formations, or portion of a formation capable of yielding usable quantities of ground water to wells or springs.

(2) "Contaminate" means introduce a substance that would cause:

(i) The concentration of that substance in the ground water to exceed the maximum contaminant level specified in Appendix I, or

(ii) An increase in the concentration of that substance in the ground water where the existing concentration of that substance exceeds the maximum contaminant level specified in Appendix I.

(3) "Ground water" means water below the land surface in the zone of saturation.

(4) "Underground drinking water source" means:

(i) An aquifer supplying drinking water for human consumption, or

(ii) An aquifer in which the ground water contains less than 10,000 mg/1 total dissolved solids.

(5) "Solid waste boundary" means the outermost perimeter of the solid waste (projected in the horizontal plane) as it would exist at completion of the disposal activity.

[44 FR 53460, Sept. 13, 1979, as amended at 46 FR 47052, Sept. 23, 1981]

§ 257.3-5 Application to land used for the production of food-chain crops (interim final).

(a) Cadmium. A facility or practice concerning application of solid waste to within one meter (three feet) of the surface of land used for the production of food-chain crops shall not exist or occur, unless in compliance with all requirements of paragraph (a)(1) (i) through (iii) of this section or all requirements of paragraph (a)(2) (i) through (iv) of this section.

(1)(i) The pH of the solid waste and soil mixture is 6.5 or greater at the time of each solid waste application, except for solid waste containing cadmium at concentrations of 2 mg/kg (dry weight) or less.

(ii) The annual application of cadmium from solid waste does not exceed 0.5 kilograms per hectare (kg/ha) on land used for production of tobacco, leafy vegetables or root crops grown for human consumption. For other food-chain crops, the annual cadmium application rate does not exceed:

Time period	Annual Cd application rate (kg/ha)
Present to June 30, 1984	2.0
July 1, 1984 to Dec. 31, 1986	1.25
Beginning Jan. 1, 1987	0.5

(iii) The cumulative application of cadmium from solid waste does not exceed the levels in either

paragraph (a)(1)(iii)(A) of this section or paragraph (a)(1)(iii)(B) of this section.

(A)

Soil cation exchange capacity (meq/100g)	Maximum cumulative application (kg/ha)	
	Background soil pH less than 6.5	Background soil pH more than 6.5
Less than 5	5	5
5 to 15	5	10
More than 15	5	20

(B) For soils with a background pH of less than 6.5, the cumulative cadmium application rate does not exceed the levels below: Provided, That the pH of the solid waste and soil mixture is adjusted to and maintained at 6.5 or greater whenever food-chain crops are grown.

Soil cation exchange capacity (meq/100g)	Maximum cumulative application (kg/ha)
Less than 5	5
5 to 15	10
More than 15	20

(2)(i) The only food-chain crop produced is animal feed.

(ii) The pH of the solid waste and soil mixture is 6.5 or greater at the time of solid waste application or at the time the corp is planted, whichever occurs later, and this pH level is maintained whenever food-chain crops are grown.

(iii) There is a facility operating plan which demonstrates how the animal feed will be distributed to preclude ingestion by humans. The facility operating plan describes the measures to be taken to safeguard against possible health hazards from cadmium entering the food chain, which may result from alternative land uses.

(iv) Future property owners are notified by a stipulation in the land record or property deed which states that the property has received solid waste at high cadmium application rates and that good-chain crops should not be grown, due to a possible health hazard.

(b) Polychlorinated Biphenyls (PCBs). Solid waste containing concentrations of PCBs equal to or greater than 10 mg/kg (dry weight) is incorporated into the soil when applied to land used for producing animal feed, including pasture crops for animals raised for milk. Incorporation of the solid waste into the soil is not required if it is assured that the PCB content is less than 0.2 mg/kg (actual weight) in animal feed or less than 1.5 mg/kg (fat basis) in milk.

(c) As use in this section:

(1) "Animal feed" means any crop grown for consumption by animals, such as pasture crops, forage, and grain.

(2) "Background soil pH" means the pH of the soil prior to the addition of substances that alter the hydrogen ion concentration.

(3) "Cation exchange capacity" means the sum of exchangeable cations a soil can absorb expressed in milliequivalents per 100 grams of soil as determined by sampling the soil to the depth of cultivation or solid waste placement, whichever is greater, and analyzing by the summation method for distinctly acid soils or the sodium acetate method for neutral, calcareous or saline soils ("Methods of Soil Analysis, Agronomy, Monograph

No. 9." C. A. Black, ed., American Society of Agronomy, Madison, Wisconsin, pp 891-901, 1965).

(4) "Food-chain crops" means tobacco, crops grown for human consumption, and animal feed for animals whose products are consumed by humans.

(5) "Incorporated into the soil" means the injection of solid waste beneath the surface of the soil or the mixing of solid waste with the surface soil.

(6) "Pasture crops" means crops such as legumes, grasses, grain stubble and stover which are consumed by animals while grazing.

(7) "pH" means the logarithm of the reciprocal of hydrogen ion concentration.

(8) "Root crops" means plants whose edible parts are grown below the surface of the soil.

(9) "Soil pH" is the value obtained by sampling the soil to the depth of cultivation or solid waste placement, whichever is greater, and analyzing by the electrometric method. ("Methods of Soil Analysis, Agronomy Monograph No. 9," C. A. Black, ed., American Society of Agronomy, Madison, Wisconsin, pp. 914-926, 1965.)

[44 FR 53460, Sept. 13, 1979, 44 FR 54708, Sept. 21, 1979]

§ 257.3-6 Disease.

(a) Disease Vectors. The facility or practice shall not exist or occur unless the on-site population of disease vectors is minimized through the periodic application of cover material or other techniques as appropriate so as to protect public health.

(b) Sewage sludge and septic tank pumpings (Interim Final). A facility or practice involving disposal of sewage

sludge or septic tank pumpings shall not exist or occur unless in compliance with paragraphs (b)(1), (2) or (3) of this section.

(1) Sewage sludge that is applied to the land surface or is incorporated into the soil is treated by a Process to Significantly Reduce Pathogens prior to application or incorporation. Public access to the facility is controlled for at least 12 months, and grazing by animals whose products are consumed by humans is prevented for a least one month. Processes to Significantly Reduce Pathogens are listed in Appendix II, Section A. (These provisions do not apply to sewage sludge disposed of by a trenching or burial operation.)

(2) Septic tank pumpings that are applied to the land surface or incorporated into the soil are treated by a Process to Significantly Reduce Pathogens (as listed in Appendix II, Section A), prior to application or incorporation, unless public access to the facility is controlled for at least 12 months and unless grazing by animals whose products are consumed by humans is prevented for at least one month. (These provisions do not apply to septic tank pumpings disposed of by a trenching or burial operation.)

(3) Sewage sludge or septic tank pumpings that are applied to the land surface or are incorporated into the soil are treated by a Process to Further Reduce Pathogens, prior to application or incorporation, if crops for direct human consumption are grown within 18 months subsequent to application or incorporation. Such treatment is not required if there is no contact between the solid waste and the edible portion of the crop; however, in this case the solid waste is treated by a Process to Significantly Reduce Pathogens, prior to application; public access to the facility is controlled for at least 12 months; and grazing by animals whose

products are consumed by humans is prevented for at least one month. If crops for direct human consumption are not grown within 18 months of application or incorporation, the requirements of paragraphs (b)(1) and (2) of this section apply. Processes to Further Reduce Pathogens are listed in Appendix II, Section B.

(c) As use in this section:

(1) "Crops for direct human consumption" means crops that are consumed by humans without processing to minimize pathogens prior to distribution to the consumer.

(2) "Disease vector" means rodents, flies, and mosquitoes capable of transmitting disease to humans.

(3) "Incorporated into the soil" means the injection of solid waste beneath the surface of the soil or the mixing of solid waste with the surface soil.

(4) "Periodic application of cover material" means the application and compaction of soil or other suitable material over disposed solid waste at the end of each operating day or at such frequencies and in such a manner as to reduce the risk of fire and to impede vectors access to the waste.

(5) "Trenching or burial operation" means the placement of sewage sludge or septic tank pumpings in a trench or other natural or man-made depression and the covering with soil or other suitable material at the end of each operating day such that the wastes do not migrate to the surface.

[44 FR 53460, Sept. 13, 1979; 44 FR 54708, Sept. 21, 1979]

§ 257.3-7 Air.

(a) The facility or practice shall not engage in open burning of residential, commercial, institutional or industrial solid waste. This requirement does not apply to infrequent burning of agricultural wastes in the field, silvicultural wastes for forest management purposes, land-clearing debris, diseased trees, debris from emergency clean-up operations, and ordnance.

(b) For purposes of Section 4004(a) of the Act, the facility shall not violate applicable requirements developed under a State Implementation Plan (SIP) approved or promulgated by the Administrator pursuant to Section 110 of the Clean Air Act, as amended.

(c) As used in this section "open burning" means the combustion of solid waste without (1) control of combustion air to maintain adequate temperature for efficient combustion, (2) containment of the combustion reaction in an enclosed device to provide sufficient residence time and mixing for complete combustion, and (3) control of the emission of the combustion products.

[44 FR 53460, Sept. 13, 1979, 44 FR 54708, Sept. 21, 1979, as amended at 46 FR 47052, Sept. 23, 1981]

§ 257.3-8 Safety.

(a) Explosive gases. The concentration of explosive gases generated by the facility or practice shall not exceed:

(1) Twenty-five percent (25%) of the lower explosive limit for the gases in facility structures (excluding gas control or recovery system components); and

(2) The lower explosive limit for the gases at the property boundary.

(b) Fires. A facility or practice shall not pose a hazard to the safety of persons or property from fires. This may be accomplished through compliance with § 257.3-7 and through the periodic application of cover material or other techniques as appropriate.

(c) Bird hazards to aircraft. A facility or practice disposing of putrescible wastes that may attract birds and which occurs within 10,000 feet (3,048 meters) of any airport runway used by turbojet aircraft or within 5,000 feet (1,524 meters) of any airport runway used by only piston-type aircraft shall not pose a bird hazard to aircraft.

(d) Access. A facility or practice shall not allow uncontrolled public access so as to expose the public to potential health and safety hazards at the disposal site.

(e) As used in this section:

(1) "Airport" means public-use airport open to the public without prior permission and without restrictions within the physical capacities of available facilities.

(2) "Bird hazard" means an increase in the likelihood of bird/aircraft collisions that may cause damage to the aircraft or injury to its occupants.

(3) "Explosive gas" means methane (CH_4).

(4) "Facility structures" means any buildings and sheds or utility or drainage lines on the facility.

(5) "Lower explosive limit" means the lowest percent by volume of a mixture of explosive gases which will propagate a flame in air at 25°C and atmospheric pressure.

(6) "Periodic application of cover material" means the application and compaction of soil or other suitable material over disposed solid waste at the end of each operating day or at such frequencies and in such a manner

as to reduce the risk of fire and to impede disease vectors' access to the waste.

(7) "Putrescible wastes" means solid waste which contains organic matter capable of being decomposed by microorganisms and of such a character and proportion as to be capable of attracting or providing food for birds.

§ 257.4 Effective date.

These criteria become effective October 15, 1979.

Appendix I

The maximum contaminant levels promulgated herein are for use in determining whether solid waste disposal activities comply with the ground-water criteria (§257.3-4). Analytical methods for these contaminants may be found in 40 CFR Part 141 which should be consulted in its entirety.

1. Maximum contaminant levels for inorganic chemicals. The following are the maximum levels of inorganic chemicals other than fluoride:

Contaminant	Level (milligrams per liter)
Arsenic	0.05
Barium	1
Cadmium	0.010
Chromium	0.05
Lead	0.05
Mercury	0.002
Nitrate (as N)	10
Selenium	0.01
Silver	0.05

The maximum contaminant levels for fluoride are:

Temperature[1] degrees Fahrenheit	Degrees Celsius	Level (milligrams per liter)
53.7 and below	12 and below	2.4
53.8 to 58.3	12.1 to 14.6	2.2
58.4 to 63.8	14.7 to 17.6	2.0
63.9 to 70.6	17.7 to 21.4	1.8
70.7 to 79.2	21.5 to 26.2	1.6
79.3 to 90.5	26.3 to 32.5	1.4

[1] Annual average of the maximum daily air temperature.

2. Maximum contaminant levels for organic chemicals. The following are the maximum contaminant levels for organic chemicals:

	Level (milligrams per liter)
(a) Chlorinated hydrocarbons:	
Endrin (1,2,3,4,10,10-Hexachloro- 6,7-epoxy-1,4,4a,5,6,7,8,8a-octahydro-1,4-endo, endo-5,8-dimethano naphthalene)	0.0002
Lindane (1,2,3,4,5,6-Hexachlorocyclo-hexane, gamma isomer	0.004
Methoxychlor (1,1,1-Trichloro-2,2-bis (p-methoxyphenyl) ethane)	0.1
Toxaphene ($C_{10}H_{10}Cl_8$-Technical chlorinated camphene, 67 to 69 percent chlorine)	0.005
(b) Chlorophenoxys:	
2,4-D (2,4-Dichlorophenoxy-acetic acid)	0.1
2,4,5-TP Silvex (2,4,5-Trichlorophen- oxy-propionic acid)	0.01

3. Maximum microbiological contaminant levels. The maximum contaminant level for coliform bacteria from any one well is as follows:

(a) using the membrane filter technique:

(1) Four coliform bacteria per 100 milliliters if one sample is taken, or

(2) Four coliform bacteria per 100 milliliters in more than one sample of all the samples analyzed in one month.

(b) Using the five tube most probable number procedure, (the fermentation tube method) in accordance with the analytical recommendations set forth in "Standard Methods for Examination of Water and Waste Water", American Public Health Association, 13th Ed. pp. 662-688, and using a Standard sample, each portion being one fifth of the sample:

(1) If the standard portion is 10 milliliters, coliform in any five consecutive samples from a well shall not be present in three or more of the 25 portions, or

(2) If the standard portion is 100 milliliters, coliform in any five consecutive samples from a well shall not be present in five portions in any of five samples or in more than fifteen of the 25 portions.

4. Maximum contaminant levels for radium-226, radium-228, and gross alpha particle radioactivity. The following are the maximum contaminant levels for radium-226, radium-228, and gross alpha particle radioactivity:

(a) Combined radium-226 and radium-228 — 5 pCi/l;

(b) Gross alpha particle activity (including radium-226 but excluding radon and uranium)—15 pCi/l.

Appendix II

A. Process to Significantly Reduce Pathogens

Aerobic digestion: The process is conducted by agitating sludge with air or oxygen to maintain aerobic conditions at residence times ranging from 60 days at 15° C to 40 days at 20° C, with a volatile solids reduction of at least 38 percent.

Air Drying: Liquid sludge is allowed to drain and/or dry on under-drained sand beds, or paved or unpaved basins, in which the sludge is at a depth of nine inches. A minimum of three months is needed, two months of which temperatures average on a daily basis above 0° C.

Anaerobic digestion: The process is conducted in the absence of air at residence times ranging from 60 days at 20° C C to 15 days at 35° to 55° C, with a volatile solids reduction of at least 38 percent.

Composting: Using the within-vessel, static aerated pile or windrow composting methods, the solid waste is maintained at minimum operating conditions of 40° C for 5 days. For four hours during this period the temperature exceeds 55° C.

Lime Stabilization: Sufficient lime is added to produce a pH of 12 after 2 hours of contact.

Other methods: Other methods or operating conditions may be acceptable if pathogens and vector attraction of the waste (volatile solids) are reduced to an extent equivalent to the reduction achieved by any of the above methods.

B. Processes to Further Reduce Pathogens

Composting: Using the within-vessel composting method, the solid waste is maintained at operating conditions of 55° C or greater for three days. Using the static aerated pile composting method, the solid waste is maintained at operating conditions of 55° C or greater for three days. Using the windrow composting method, the solid waste attains a temperature of 55° C or greater for at least 15 days during the composting period. Also, during the high temperature period, there will be a minimum of five turnings of the windrow.

Heat drying: Dewatered sludge cake is dried by direct or indirect contact with hot gases, and moisture content is reduced to 10 percent or lower. Sludge particles reach temperatures well in excess of 80° C, or the wet bulb temperature of the gas stream in contact with the sludge at the point where it leaves the dryer is in excess of 80° C.

Heat treatment: Liquid sludge is heated to temperatures of 180° C for 30 minutes.

Thermophilic Aerobic Digestion: Liquid sludge is agitated with air or oxygen to maintain aerobic conditions at residence time of 10 days at 55-60° C, with a volatile solids reduction of at least 38 percent.

Other methods: Other methods or operating conditions may be acceptable if pathogens and vector attraction of the waste (volatile solids) are reduced to an extent equivalent to the reduction achieved by any of the above methods.

Any of the processes listed below, if added to the processes described in Section A above, further reduce pathogens. Because the processes listed below, on their own, do not reduce the attraction of disease vectors, they are only add-on in nature.

Beta ray irradiation: Sludge is irradiated with beta rays from an accelerator at dosages of at least 1.0 megarad at room temperature (ca. 20° C).

Gamma ray irradiation: Sludge is irradiated with gamma rays from certain isotopes, such as ^{60}Cobalt and ^{137}Cesium, at dosages of at least 1.0 megarad at room temperature (ca. 20° C).

Pasteurization: Sludge is maintained for at least 30 minutes at a minimum temperature of 70° C.

Other methods: Other methods or operating conditions may be acceptable if pathogens are reduced to an extent equivalent to the reduction achieved by any of the above add-on methods.

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 3550 Wilshire Boulevard, Suite 916, Los Angeles, California. On this date, September 23, 1985, I served the within PETITION FOR WRIT OF CERT-IORARI in re: "County Sanitation District No. 2 of Los Angeles County vs. Los Angeles County Employees Association, Local 660, Service Employees International Union, AFL-CIO" in the United States Supreme Court, October Term, 1985, No..... on the persons interested in said action by placing 3 true copies thereof enclosed in sealed envelopes with first class postage prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

LEO GEFFNER, JEFFREY PAULE, GEFFNER & SATZMAN, Suite 900, 3055 Wilshire Blvd., Los Angeles, CA 90010;

and 1 copy on each of the following:

GEORGE AGNOST, City Attorney, PHILIP S. WARD, STEVEN A. DIAZ, Deputy City Attorneys Room 206, City Hall, San Francisco, CA 94102.

GLENN ROTHNER, ANTHONY R. SEGALL, REICH, ADELL & CROST, Suite 100, 501 Shatto Place, Los Angeles, CA 90020;

A. EUGENE HUGUENIN, JR., MICHAEL R. WHITE, RAYMOND L. HANSON, CHARLES R. GUSTAFSON, California Teachers Association, P.O. Box 92888, Los Angeles, CA 90009;

VICTOR J. VAN BOURG, VAN BOURG, ALLEN, WEINBERG & ROGER, 875 Battery St., San Francisco, CA 94111;

RONALD A. ZUBRUM, ANTHONY T. CASO, PACIFIC LEGAL FOUNDATION, Suite 600, 455 Capitol Mall, Sacramento, CA 95814;

I certify (or declare) under penalty of perjury that the foregoing is true and correct.

Executed on Septemner 23, 1985

at Los Angeles, California.

Kathleen Kastenbaum

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 3550 Wilshire Boulevard, Suite 916, Los Angeles, California. On this date, September 23, 1985, I served the within PETITION FOR WRIT OF CERTIORARI in re: "County Sanitation District No. 2 of Los Angeles County vs. Los Angeles County Employees Association, Local 660, Service Employees International Union, AFL-CIO" in the United States Supreme Court, October Term, 1985, No. ..... on the persons interested in said action by placing 1 true copies thereof enclosed in sealed envelopes with first class postage prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows: continued:

FRED OKRAND, 633 South Shatto Place, Los Angeles, CA 90005;
CHARLES P. SCULLY, DONALD C. CARROLL, CHARLES P. SCULLY, II, 20th Floor, 220 Bush Street, San Francisco, CA 94104;
HENRY R. FENTON, ESQ., LEVY, ANSELL & GOLDMAN, 2nd Floor, 611 South Shatto Place, Los Angeles, CA 90005;
H. JESS SENECAL, ESQ., JACK T. SWAFFORD, ESQ., BURRIS, LAGERLOF, SWIFT & SENECAL, Suite 2500, 3435 Wilshire Blvd., Los Angeles, CA 90010;

All parties required to be served have been served.

I certify (or declare) under penalty of perjury that the foregoing is true and correct
Executed on September 23, 1985
at Los Angeles, California.

Kathleen Kaltenbach